Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TRAFFORD DISTRIBUTION CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a finding of unlawful employer intent to avoid labor law obligations is essential to the imposition of alter ego status under the National Labor Relations Act.

Whether the determinations of the ALJ on the issue of employer intent, as affirmed by the Board and the Third Circuit, were unsupported by substantial evidence.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the United States Court of Appeals for the Third Circuit:

Trafford Distribution Center
Petitioner in No. 05-3765, Respondent in 05-4198

National Labor Relations Board
Respondent in 05-3765, Petitioner in 05-4198

Liberty Source W, LLC
Respondent in 05-4198

Petitioner Trafford Distribution Center has no parent company or publicly held company owning 10 percent or more of its stock.

TABLE OF CONTENTS

Questions Presented.....i

Rule 14.1(b) and 29.6 Statement.....ii

Table of Contents.....iii

Table of Authorities.....v

Opinions Below.....1

Jurisdiction.....1

Statutory Provisions Involved.....1

Statement of the Case.....2

Reasons for Granting the Petition.....9

I. The Decision of the Third Circuit Directly Conflicts With Decisions of the Seventh, Eighth, and Ninth Circuits That Require Unlawful Intent as a Prerequisite for the Imposition of Alter Ego Status and Is Also Inconsistent With Decisions of the Fourth Circuit.....9

II. Whether Unlawful Intent Is Required as an Element of Alter Ego Status Presents an Important Question of Federal Labor Law That Has Not Been, but Should Be, Settled by This Court.....12

III. Certiorari is Warranted Because the Determinations of the ALJ, as Affirmed by the Board and the Third Circuit, were Unsupported by Substantial Evidence.....16

Conclusion.....19

Appendix

Appendix A — *Trafford Distribution Center v. N.L.R.B.*, 478 F.3d 172 (3d Cir. 2007).....1a

Appendix B — *Liberty Source W, LLC and/or Trafford Distribution Center, Its Alter Ego*, 344 NLRB No. 137 (2005).....19a

Appendix C — Statutory Provisions Involved, 29 U.S.C. §§ 157, 158(a)(1), 158(a)(5), 158(d), 159(a).....72a

TABLE OF AUTHORITIES

Cases

A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514 (9th Cir. 1989).....10

Alkire v. NLRB, 716 F.2d 1014 (4th Cir. 1993) 11

Carpenters, Local 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), *cert. denied,* 464 U.S. 932 (1983) 10

Crest Tankers, Inc. v. National Maritime Union, 796 F.2d 234 (8th Cir. 1986) 10

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 13, 13n2

Fugazy Continental Corp. v. NLRB 725 F.2d 1416 (D.C. Cir. 1984) 10

Goodman Piping Prods. v. NLRB, 741 F.2d 10 (2d Cir. 1984) 10

H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 12

Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974) 14

ILA, Local 1988 v. Pate Stevedore Co., 145 LRRM (BNA) 2275 (N.D. Fla. 1993), *aff'd without opinion,* 41 F.3d 668 (11th Cir. 1994) 11n1

Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305 (8th Cir. 1984) 10

John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) 13

Local 343, Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Nor-Cal Plumbing, Inc., 48 F.3d 1465 (9th Cir. 1994) 10

Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp., 139 F.3d 304 (1st Cir. 1998) 10

Morgan v. United States, 298 U.S. 468 (1936) 16-17, 19

NLRB v. Allcoast Transfer, Inc., 780 F.2d 576 (6th Cir. 1986) 10

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 13, 15

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 12-13

NLRB v. Scott Printing Corp., 612 F.2d 783 (3d Cir. 1979) 15

NLRB v. Tricor Prods., 636 F.2d 266 (10th Cir. 1980) 10

Operating Eng'rs v. Centor Contractors, 831 F.2d 1309 (7th Cir. 1987) 10

Road Sprinkler Fitters, Local 669 v. Independent Sprinkler Corp., 10 F.3d 1563 (11th Cir.), *cert. denied*, 115 S. Ct. 189 (1994) 11n1

Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942) 13-14

Stardyne, Inc. v. NLRB, 41 F.3d 141 (1994) 12

Taylor v. Standard Gas Co., 306 U.S. 307 (1939) 16n3

Textile Workers v. Darlington Mfg. Co.,
380 U.S. 263 (1965) 13

Trustees of Pension Funds of Local 701 v. Favia Electric Co., 995 F.2d 785 (7th Cir. 1993) 10

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 17

Statutory Provisions

5 U.S.C. §§ 556, 557 16

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

29 U.S.C. §§157, 158(a)(1), 158(a)(5), 158(d), 159(a) 1, 13

Miscellaneous

Sen. Doc. No. 248, 79th Cong., 2d Sess. 214 (1946).....17

Stephen Befort, *Labor Law and the Double Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*,
67 Wisc.L.Rev. 67 (1987) 11

Gary MacDonald, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations*,
86 Mich.L.Rev. 1024 (1988) 11, 16n4

Frederick Slicker, *A Reconsideration of the Doctrine of Employer Successorship — A Step Toward a Rational Approach*,
57 Minn.L.Rev. 1051 (1973) 11

Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U.L.Rev. 624, 638 (1979) 11

PETITION FOR WRIT OF CERTIORARI

Trafford Distribution Center ("Trafford") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated February 26, 2007, is officially reported at 478 F.3d 172, unofficially reported at 181 LRRM (BNA) 2449, 154 Lab. Cas. ¶ 10,809, and reproduced at App. A, 1a-18a.

The decision and order of the National Labor Relations Board, dated July 22, 2005, and the decision of the Administrative Law Judge ("ALJ") are officially reported at 344 NLRB No. 137. They are also referenced at 177 LRRM (BNA) 1331, 2005 WL 1767248, and are reproduced at App. B, 19a-71a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on February 26, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are §§ 7, 8(a)(1), 8(a)5), 8(d) and 9(a) of the National Labor Relations Act, 29 U.S.C. §§157, 158(a)(1), 158(a)(5), 158(d), 159(a) ("NLRA" or "Act"). The relevant statutory provisions are reproduced at App. C, 72a-86a.

STATEMENT OF THE CASE

This matter originated with a complaint issued on December 30, 2003 by the Director of Region 6 of the NLRB in response to charges filed by the Federation of Independent Salaried Unions ("Federation") and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO ("IUE") (collectively "Unions"). The complaint sought to bind Trafford to certain collective bargaining agreements in effect between the Unions and another company, Liberty Source W, LLC ("Liberty"), alleging that Trafford and Liberty should be treated as one entity under the alter ego doctrine. App. B, 33a.

Liberty, the former in-house printing operation of Westinghouse Corporation, was formed by Joseph Wortley in December, 1998. At one time, Liberty employed 120 people, had annual sales of more than $17 million, and was the second-largest printer in the Pittsburgh region. App. A, 3a.

Liberty's printing operation included high-quality media printing using heat-set presses and web presses that produced time-sensitive sales and marketing literature. Liberty's portfolio included work for the CBS television network, the alumni publication for Indiana University of Pennsylvania, and a catalog for Leeds, the New Kensington-based private label firm. The company also offered a broad range of "e-source," or digital, services, including web page design and CD-ROM production, as well as software development. To help bolster its internet business, Liberty had forged partnerships with Microsoft Corporation and Adobe Systems. App. A, 3a; App B, 37a.

Additionally, as a very small part of its overall business, the company operated a modest warehouse fulfillment operation, whereby customers, the largest of which was the Heinz Company, shipped materials to be held at Liberty's warehouse. As orders came in for the

customer's products, Liberty fulfilled the orders by completing the necessary packing, shipping, invoicing, and inventory control documentation. App. A, 3a; App B, 37a.

In 2003, Liberty's printing operation produced over eighty percent of the company's sales. The remainder of Liberty's business was generated by its e-source products and services and warehouse fulfillment services, with the warehouse fulfillment operation accounting for less than two percent of Liberty's total sales. App. B, 37a.

At its inception, approximately eighty-five of Liberty's employees worked on the printing side of the company. Roughly thirty people were employed by Liberty's e-source business. Only about six employees worked in the fulfillment operation. For its printing and e-source components, Liberty's employees included skilled craftsmen, artists, pressmen, refinishing workers, and customer service estimators. For its fulfillment operation, Liberty's employees included warehousemen and customer service representatives. App. B, 37a.

The employees of the in-house printing operation of Westinghouse Corporation had been represented by two Unions, Federation and IUE. When the company changed hands, Liberty entered into collective bargaining agreements with both of those Unions that essentially mirrored the contracts that they had had with Westinghouse. Liberty's salaried employees were represented by Federation; IUE represented the company's hourly workforce. App. A, 3a-4a.

Shortly after Liberty was created, New Jersey-based Independence Community Bank ("Bank") extended a loan to the new company in the principal amount of $1.5 million. Pursuant to the Revolving Loan and Security Agreement between Liberty and the Bank, the Bank's security interest in Liberty included all accounts receivable, all contracts, and all inventory and equipment. The Bank was Liberty's principal secured creditor. Throughout the years, the relationship between Liberty owner Joseph Wortley and the Bank deteriorated due to a

number of financial disagreements between the parties. App. A, 4a; App. B, 38a.

Beginning in 2002, Liberty experienced significant financial difficulties. The company was in debt to a number of suppliers, including some of Liberty's paper merchants. By 2003, Liberty had established continuing payment plans with several of these suppliers, with the goal to keep product flowing while processing its outstanding debts. Unfortunately, Liberty was unable to come to terms on payments plans with all of its suppliers. To make matters worse, Liberty needed to overhaul its commercial web press, at a cost of $1.25 million. App. B, 38a.

Liberty had obtained financing for the overhaul of the web press from Broad National Bank. However, in the midst of the financing process, Broad National was purchased by Independence Community Bank. Due to the already strained relationship between the Bank and Mr. Wortley, significant problems arose concerning the final financing terms. App. B, 38a.

Later, Liberty was unable to pay the required monthly installments of principal and interest due on its loans from the Bank, and the Bank filed a complaint in mortgage foreclosure seeking over $1.8 million in principal, interest, late charges, collection costs, and attorneys' fees from Liberty. Because it already had substantial financial difficulties, and was unable to obtain any further relief or credit from the Bank, on September 2, 2003, Liberty surrendered all of its assets, representing the collateral on its loan, to the Bank. When Liberty surrendered its assets to the Bank, the assets assumed by the Bank included the collective bargaining contracts in force between Liberty and the Unions. App. A, 4a.

On September 3, 2003, the managers of Liberty were notified by Liberty president Richard Carmody that the assets of the company had been surrendered, and that Liberty was to halt all operations, send employees home, and secure the premises and all equipment for the Bank. This turn of events took Liberty's managers by surprise

and created a somewhat chaotic situation. The managers discussed the situation, and agreed that employees should be notified immediately, and that to avoid any further confusion, a script should be drafted so that all of the employees would receive the exact same information. The message relayed to Liberty's employees and their Union representatives stated as follows: "All employees are not to report to work on Thursday, September 4th. The business is in transition between Joe Wortley and the Bank. We should know more on the situation tomorrow and will contact you as soon as more information is available." App. A, 4a; App. B, 39a-40a.

In the midst of this turmoil, the Bank was presented with a request and an opportunity to operate Liberty, which, despite its financial difficulties, was very well-poised, having a four-month backlog of work. The company had orders bringing it through the end of the calendar year, and was running three shifts per day, often seven days per week. In fact, Liberty's chief financial officer, Patrick Manderfield, advised the Bank that Liberty's value as an ongoing concern was far greater than its liquidation value and, in the interest of Liberty's employees, wanted the Bank to continue Liberty's operations. At that time, the business was cash neutral positive, so very little support would have been required from the Bank. Moreover, in terms of collateral, the Bank already owned everything that it needed to run the business. App. A, 4a.

The Bank considered this prospect, but the following week, it declined to continue the business, although it subsequently demonstrated a clear ability to do so. For example, in October, 2003, the Bank issued credit memos related to Liberty's former printing operation and it collected on Liberty's accounts receivable. In fact, the Bank hired at least one employee of Liberty to assist in the collection of outstanding receivables. Although Mr. Manderfield was also offered a position by the Bank to assist it with settling the affairs of Liberty, he declined the Bank's offer of employment. Further, and as late as January, 2004, the Bank made payments on monies owed by Liberty. App. A, 4a.

Unhappily, rather than continuing Liberty's operation, the Bank chose to liquidate the company. Since September, 2003, all of Liberty's receivables have been collected by the Bank. During the liquidation process, with the exception of a few items relevant to the fulfillment operation, the Bank auctioned off the hard assets of Liberty, including all of the printing presses. App. A, 4a.

Subsequent to the surrender of its assets to the Bank, Liberty's printing and e-source operation, which represented roughly ninety-eight percent of the company's business, rapidly dissolved. Shortly thereafter, the Heinz Company, which was the largest customer of Liberty's fulfillment operation (but certainly not the biggest customer of the overall business) inquired as to the possibility of preserving its inventory at the Trafford, Pennsylvania facility and resuming fulfillment services there. App. A, 4a.

On September 5, 2003, Joseph Wortley notified Liberty's former management staff, including president Richard Carmody, chief financial officer Patrick Manderfield, plant manager Leonard Manganello, and vice president of sales Ronald Dandrea, that if they felt they could create a viable business compromised solely of warehouse fulfillment services, he would sell it to them for one dollar. Mr. Carmody, Mr. Manderfield, Mr. Manganello, and Mr. Dandrea declined Mr. Wortley's offer. However, they agreed to formulate a business plan for a fulfillment operation. Their plan examined several factors, including anticipated revenue, staffing costs, and rental expenses. App. A, 4a.

The initial business strategy was a cash-neutral plan, which was developed to demonstrate the new business roughly breaking even. Later, Barbara Wortley, Joseph Wortley's wife, agreed to back the endeavor with an initial equity investment of $25,000. Mrs. Wortley later extended a loan to Trafford in the amount $17,000. She made no further investments in or loans to the business. The new venture also established an independent financing arrangement with Irwin Bank & Trust based on

accounts receivable. Trafford's articles of incorporation were executed on September 23, 2003. App. B, 41a.

At its inception, Trafford was in need of certain equipment, including fixtures, furniture, and appliances, to operate its fulfillment business. Trafford engaged Graphtek, Inc., a qualified appraiser, to perform a valuation of certain items then owned by the Bank but still located at the former Liberty site in Trafford, Pennsylvania. These items were necessary to Trafford's fulfillment operation. The fair liquidation value of these items, which included rack shelving, hand trucks, cabinets, office chairs, desks, pictures, and computer equipment, was listed by Graphtek, Inc. as $23,162.00. In October, 2003, the Bank agreed to sell the listed equipment to Trafford for $27,000, which was considered by both Trafford and the Bank to be a commercially reasonable value. In May, 2004, a bill of sale for the asset purchase of the listed equipment from the Bank was executed by Trafford. App. A, 4a-5a; App. B, 41a.

Shortly following Trafford's creation, the Unions filed charges against Liberty and Trafford alleging violations of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. The Unions claimed that Trafford was obligated to abide by the terms of Liberty's labor agreements. To date, no unfair labor charges have been filed against the Bank. App. B, 45a-46a.

At the time of the ALJ hearing, Trafford had only twelve employees, with ten individuals employed on a full-time basis, and two working a part-time schedule. Approximately one-half of Trafford's staff is compromised of warehouse associates; the remaining employees serve in customer service, computer support, or management positions. App. A, 7a.

At that time, Trafford had only eleven customers. Trafford provides storage and fulfillment services to eight of these eleven customers. The remaining three customers are supplied property rental, rebate program, and bulk storage services from Trafford. These new lines of business were never offered by Liberty. App. A, 7a.

As of December 31, 2003, Trafford's total accounts receivable totaled only $231,933.51. Including accounts receivable, the company's total assets amounted to $278,437.43. As of April 30, 2004, Trafford's total accounts receivable totaled $239,270.88, and its total assets amounted to $304,723.75. Trafford pays a monthly rental fee on the Trafford, Pennsylvania facility. For December, 2003, this rental payment totaled $12,000. In April, 2004, a rental payment of $10,500 was made. App. B, 41a.

On July 19 and 20, 2004, this matter was heard before administrative law judge ("ALJ") Paul Bogas. On November 24, 2004, ALJ Bogas issued a decision and recommended order finding that Trafford and Liberty are alter egos and, as such, that Trafford is bound by Liberty's collective bargaining agreements with the Unions. Based upon Trafford's failure to comply with the terms of Liberty's labor contracts, the ALJ found that Trafford violated Sections 8(a)(1) and 8(a)(5) of the Act. App. B, 55a.

Trafford, stating that the ALJ's decision was contrary to law and the evidence of record, filed exceptions and a supporting brief with the National Labor Relations Board ("Board") on December 20, 2004. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief on January 11, 2005. By decision and order dated July 22, 2005, the Board affirmed the ALJ's rulings, findings, and conclusions and adopted the recommended order of the ALJ directing Trafford to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. App. B, 20a.

Trafford filed a timely petition for review in the United States Court of Appeal for the Third Circuit, arguing that the decision by the Board lacked substantial evidence and contained an error of law with regard to the application of the alter ego test. By decision dated February 26, 2007, the Third Circuit affirmed the decision of the Board. App. A, 3a.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This petition should be granted for three reasons. First, the threshold question of law in this case, *i.e.*, whether the Board, when it seeks to apply the alter ego doctrine, must find that the change in ownership was motivated by an intent to avoid obligations under the National Labor Relations Act, is unsettled. In the absence of clear guidance from this Court, the courts of appeals have developed three distinct approaches to the question and role of intent in alter ego cases. This case presents the Court with an opportunity to resolve the split of authority in the courts of appeals.

Second, certiorari is warranted because the alter ego question is important to the administration and enforcement of the NLRA and should be settled by this Court. In its decision, the court of appeals erroneously discounted employer intent, failing to recognize this factor as an indispensable element of alter ego analysis, and has saddled Trafford with preexisting collective bargaining obligations as well as preexisting terms and conditions of employment. The court's ruling, therefore, stringently and impermissibly impedes the full effectuation of a bona fide entrepreneurial corporate transformation that has provided new and much needed employment opportunities in Trafford, Pennsylvania.

Third, the court of appeal's determinations concerning unlawful motive are unsupported by substantial evidence.

I. The Decision of the Third Circuit Directly Conflicts With Decisions of the Seventh, Eighth, and Ninth Circuits That Require Unlawful Intent as a Prerequisite for the Imposition of Alter Ego Status and Is Also Inconsistent With Decisions of the Fourth Circuit.

The courts of appeals are divided on the proper role of intent in alter ego cases under the NLRA. There are three basic approaches to the question. In conjunction with the Third Circuit, the First, Second, Fifth, Sixth, Tenth, and District of Columbia Circuits agree that intent is relevant

but not essential to an alter ego finding. *See, e.g., Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 308 (1st Cir. 1998); *Goodman Piping Prods. v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984) (per curiam); *Carpenters, Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986); *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984) (per curiam).

The Seventh, Eighth, and Ninth Circuits have concluded that unlawful employer intent must be present before alter ego status may be imposed. *See, e.g., Trustees of Pension Funds of Local 701 v. Favia Electric Co.*, 995 F.2d 785, 789 (7th Cir. 1993) ("unlawful motive or intent are [sic] necessary for the application of the alter ego doctrine"); *Operating Eng'rs v. Centor Contractors*, 831 F.2d 1309, 1312 (7th Cir. 1987) ("[u]nlawful motive or intent are [sic] critical inquiries in an alter ego analysis"); *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 237-38 (8th Cir. 1986) (emphasizing "critical motivational aspects" of the court's alter ego analysis); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir.) ("[u]nlawful motive or intent are [sic] critical inquiries in an alter ego analysis" and finding that one employer "may have been formed specifically to avoid the labor law obligations" of the other, a "consideration that is at the heart of the alter ego inquiry"), *cert. denied*, 469 U.S. 1088 (1984); *Local 343, Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1994 U.S. App. LEXIS 39559 *7 (9th Cir. 1994) ("[t]o prevail on the 'alter ego' theory, appellees were required ... to prove that North Bay was being used 'in a sham effort to avoid collective bargaining obligations' ... rather than for the pursuit of legitimate business objectives untainted by 'union animus'") (citations omitted); *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 519 (9th Cir. 1989) ("[i]n all alter ego determinations an element of fraud or

misrepresentation also exists").[1]

The Fourth Circuit has taken yet a third approach to the question, adopting a "reasonably foreseeable benefit" standard that analyzes "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." *See, e.g., Alkire v. NLRB,* 716 F.2d 1014, 1020 (4th Cir. 1993).

Commentators who have discussed this issue are also divided. *Compare* Frederick Slicker, *A Reconsideration of the Doctrine of Employer Successorship-A Step Toward a Rational Approach,* 57 Minn.L.Rev. 1051, 1064 (1973) (arguing for an intent based standard); Comment, *Bargaining Obligations After Corporate Transformations,* 54 N.Y.U.L.Rev. 624, 638 (1979) (same) *with* Stephen Befort, *Labor Law and the Double Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation,* 67 Wisc.L.Rev. 67, 101 (1987) (arguing against requiring intent); Gary MacDonald, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations,* 86 Mich.L.Rev. 1024, 1056 (1988) (same).

A close look at the consideration of intent by the ALJ, the Board, and the Third Circuit in this case illustrates and accentuates the confusion and uncertainty that presently exist concerning the role of intent in alter ego cases. The ALJ expressly stated that "[a] showing of improper motive is not necessary to a finding of alter ego status." App. B, 51a. Still, his alter ego finding — which the Board affirmed without extended explanation — was predicated on his analysis that Trafford was created as a device to evade responsibilities under the Act. In

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[1] The position of the Eleventh Circuit is not clear. *See generally Road Sprinkler Fitters, Local 669 v. Independent Sprinkler Corp.,* 10 F.3d 1563, 1568 &n.4 (11th Cir.), *cert. denied,* 115 S. Ct. 189 (1994); *ILA, Local 1988 v. Pate Stevedore Co.,* 145 LRRM (BNA) 2275, 2278-79 & n.4 (N.D. Fla. 1993), *aff'd without opinion,* 41 F.3d 668 (11th Cir. 1994).

affirming the ALJ's finding that the purpose behind the creation of Trafford was to avoid legal obligations under the Act, Chairman Battista adhered to his position that the General Counsel must show, *inter alia*, an intent to avoid legal obligations under the Act in order to prove alter ego status; however, the Chairman nonetheless concurred with his colleagues in the finding of alter ego status. App. B, 28a. In affirming the Board's determination, the court of appeals adopted the ALJ's position that a showing of unlawful intent is not a prerequisite to a finding of alter ego status. App. A, 8a.

Prior to its decision in this case, the Third Circuit had noted that the "[a]pplication of the National Labor Relations Act to cases involving a reorganization of an employer has proven to be vexing" and that the issue of the role of intent in alter ego cases "has yielded no consensus among the courts of appeals that have considered it." *Stardyne, Inc. v. NLRB,* 41 F.3d at 146. The uncertainty enunciated by the Third Circuit epitomizes the uncertainty that is prevalent because of the conflict in the courts of appeals. This Court should grant the petition to review this division and to eliminate this confusion.

II. Whether Unlawful Intent Is Required as an Element of Alter Ego Status Presents an Important Question of Federal Labor Law That Has Not Been, but Should Be, Settled by This Court.

The alter ego issue in this petition involves fundamental considerations of national labor policy. This Court has stated that "the fundamental premise" of the NLRA is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB,* 397 U.S. 99, 108 (1970). This has been the Act's fundamental premise from its inception. "The theory of the [A]ct is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the [A]ct in itself does not attempt to compel." *NLRB v. Jones & Laughlin*

Steel Corp., 301 U.S. 1, 45 (1937); *see* 29 U.S.C. § 158(d) (Act "does not compel either party to agree to a proposal or to require the making of a concession").

This Court has also recognized that employers must have the flexibility and ability to reorganize and transform their business. The Court has stated, for example, that "an employer has the absolute right to terminate his entire business for any reason." *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965). In an analogous context, the Court has concluded "that the harm likely to be done to an employer's need ... to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision...." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981).[2]

In juxtaposition to this backdrop of legitimate employer interests and rights in the alter ego context are employee interests and expectations in maintaining their union's collective bargaining relationship. This Court has grappled with this tension in national labor policy in related contexts. *See, e.g., NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972) (elucidating scope of the "successorship" doctrine that normally obligates the successor to recognize and bargain with the union but not to adhere to the predecessor's contractual obligations); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 551-52 (1964). The Court should act now to resolve this underlying tension in alter ego cases.

The Court has materially discussed the alter ego doctrine under the NLRA on only two previous occasions. The Court solidified the foundation of the doctrine in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). The relevant test was described in general terms:

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[2] In *First National Maintenance*, the Court held that "an economically motivated decision to shut down part of a business" is "*not* part of § 8(d)'s 'terms and conditions' ... over which Congress has mandated bargaining." 452 U.S. at 680, 686 (emphasis in the original).

"[w]hether there was a bona fide discontinuance and a true change of ownership ... or merely a disguised continuance of the old employer." *Id.* at 106. The *Southport* decision, however, did not resolve whether unlawful intent to avoid labor obligations was a necessary predicate of the doctrine.

In *Southport Petroleum,* the Court was faced with a company that had violated the prohibition in Section 8(a)(3) of the Act forbidding discriminatory discharges on the basis of union activity. *See* 315 U.S. at 101-02. After stipulating that it would obey the NLRB's order, the company, three days later, distributed all of its assets to four stockholders who, in turn, conveyed these assets to a newly organized company. *Id.* at 102-03. The stockholders claimed that, in view of the dissolution of the predecessor company, the Board's remedial order had no effect. *Id.* The only issue before the Court was whether the court of appeals had erroneously denied the organized company the right to introduce evidence concerning the dissolution of the predecessor company. *Id.* at 104. The Court affirmed that the Board's order was appropriately directed to the newly organized company. *Id.* at 106. There was clear unlawful intent in the blatant attempt to avoid the Board order in *Southport Petroleum,* and the Court did not rule — and had no need to rule — on the intent question presented in this petition. *Southport Petroleum* did not even involve a potential violation of Section 8(a)(5) and adherence to contractual obligations — the central issue before the Court in this petition.

The Supreme Court's other treatment of the alter ego doctrine occurred in *Howard Johnson Co. v. Hotel Employees,* 417 U.S. at 259 n.5. The Court's discussion of the alter ego doctrine occurred *en passant;* the Court's holding concerned the "successorship" doctrine and the principle that, unless there is substantial continuity of the workforce, an asset purchaser was not bound by an agreement to arbitrate under the seller's collective bargaining agreement. *Id.* at 262-64. Cases such as *Howard Johnson* and *Southport* have served to engender the controversy in the courts of appeals concerning intent and accentuate the need for the Court's careful scrutiny of

the issue.

The proper resolution of the intent question and balancing of relevant policy interests has been succinctly articulated by Chief Judge Sloviter of the Third Circuit, who provides the appropriate analytical framework for resolution of this case. When a company is formed for antiunion reasons or to avoid outstanding labor law obligations:

> it is necessary to overlook the corporate technicalities in order to prevent subversion of the NLRA process and frustration of national labor policy. On the other hand, in the absence of evidence of such an unlawful motive, the courts have effectuated the countervailing policy that employers can use their business judgment....

NLRB v. Scott Printing Corp., 612 F.2d 783, 791 (3d Cir. 1979) (Sloviter, C.J., dissenting). Otherwise, a potential employer — even an employer that may share a substantial identity with a predecessor employer — may be unwilling to put time, money, and resources into saving "a moribund business." And saving that business may entail "changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." *NLRB v. Burns International Security Services, Inc.*, 406 U.S. at 287-88.

There can be no question in this case but that Liberty was "a moribund business." Liberty's demise and Trafford's subsequent creation was not designed to avoid Liberty's collective bargaining obligations with the unions; it had nothing to do with the unions. Liberty's closure was the inevitable and unfortunate result of the deteriorating financial relationship between Mr. Wortley and the Bank, which culminated in the Bank's filing of a $1.8 million complaint in mortgage foreclosure against Liberty. As the ALJ properly recognized, "it implausible that J. Wortley would sacrifice the printing and e-source operations that constituted over 90 percent of Liberty's business for the purpose of freeing the warehouse/

fulfillment operation from its labor law responsibilities ... that would not be the tail wagging the dog, but the "tip of the tail" wagging the dog." App. B, 51a. Likewise, Trafford's ensuing formation and operation was simply an attempt to start and maintain a small, legitimate business. Under these circumstances, the alter ego doctrine — an equitable doctrine[3] — should not be applied as a matter of federal labor law to inhibit a company whose purpose is not to evade preexisting collective bargaining obligations. The Court should review this legal question of great practical importance in federal labor law and rectify this unfair result.[4]

III. Certiorari is Warranted Because the Determinations of the ALJ, as Affirmed by the Board and the Third Circuit, were Unsupported by Substantial Evidence.

The substantial evidence test applies when agency action occurs in connection with an adjudicatory hearing, *see* 5 U.S.C. §§ 556 and 557, which was precisely the type of hearing held in this case. In *Morgan v. United States*, 298 U.S. 468, 480 (1936), this Court explained that such a hearing "has a quality resembling that of a judicial proceeding" and that such proceedings are frequently described as possessing "a quasijudicial character." Continuing, the *Morgan* Court held that an adjudicatory hearing under 5 U.S.C. §§ 556 and 557 "is the hearing of

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[3] Distilled to its essence, the alter ego doctrine centers around the disregard of corporate form. This Court has stated that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). The alter ego doctrine has been fashioned to ensure that corporate form does not override the federal legislative policies set forth in the NLRA. It is particularly appropriate for this Court to decide when federal labor law policies requiring adherence to contractual obligations supersede adherence to corporate form.

[4] *See generally* Note, 86 Mich. L. Rev. at 1027 n.14 (discussing increasing "activity ... and importance" of alter ego cases).

evidence and argument" and that if the hearing officer "who determined the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. at 480-81.

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), this Court stated in no uncertain terms that "substantial evidence" under the APA requires a thorough review of the entire record.[5] According to the *Universal Camera* Court's analysis, the Administrative Procedure Act definitively bars the practice of ignoring "contradictory evidence or evidence from which conflicting inferences could be drawn...." 340 U.S. at 487. Continuing, the *Universal Camera* Court held that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in [the APA] that the court consider the whole record." 340 U.S. at 488. The APA's own legislative history, which reinforces *Universal Camera* Court's analysis, indicates that the APA's "requirement of review upon the whole record" means that an agency fact-finder "may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

Pursuant to the holdings in *Morgan* and *Universal Camera*, and the APA's own legislative history, the ALJ was required to consider "the whole record" before ruling on the question of Trafford's alter ego status. It is apparent in this case that the ALJ failed to consider "the whole record" before rendering his ruling on Trafford's status. In considering the role of intent, the ALJ stated that "[t]here is little in the record to show that the decision to cease operating as Liberty and continue the warehouse/ fulfillment operation in the form of a new entity, was done for legitimate reasons." In fact, the

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[5] The standard of proof specifically required of National Labor Relations Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act. 340 U.S. at 487.

evidence clearly shows that the demise of Liberty and subsequent creation of Trafford constituted a bona fide discontinuance and a true change of ownership. Nothing in the record is inconsistent with the conclusion that Trafford was established in a legitimate attempt to offer services, some of which had previously been provided by another company. Trafford was not created as a disguise. It was not formed to evade any labor obligations. Trafford's formation and operation was simply an attempt to start and maintain a small, legitimate business.

The ALJ failed to consider evidence establishing that there was never any preconceived plan to create Trafford at all, including Trafford's plant manager Leonard Manganello's testimony that "[w]e were taking one day at a time. I had no assurance that this was going to work. I, myself, was there on a day to day basis. I wasn't sure if I was going to get a paycheck. We just took it one day at a time...." App B, 51a-53a.

Evidence demonstrating that Trafford gave no consideration whatsoever to any individual's status as being represented by either of the Unions in selecting the individuals who would ultimately compromise its new workforce was also disregarded by the ALJ. In recruiting employees to work for Trafford, Mr. Manganello testified that he sought out individuals who: 1) had the ability to multi-task; (2) demonstrated flexibility; (3) had a basic understanding of warehouse duties; (4) had the necessary computer skills; and (5) had experience interacting with customers, who would often visit the worksite. The evidence established that Trafford was simply looking for the "best people" to help it get its new operation off the ground. App B, 51a-53a.

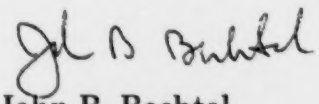
Finally, but perhaps most significantly, the ALJ ignored the fact that Liberty was irrefutably in default at the time that it ceased operations and turned over its assets to the Bank. Such evidence obviously weighs heavily in favor of the conclusion that the cessation of Liberty's operations was motivated not by a desire to avoid its labor law obligations, but rather by legitimate business reasons. App B, 51a-53a.

According to the *Morgan* Court, the weight ascribed by the law to ALJ's determinations herein "rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify." 298 U.S. at 481. As such, the ALJ's determination that a desire to avoid labor law obligations was a motivation for Trafford's creation was unsupported by substantial evidence. Accordingly, this Court's immediate intervention is required.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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May 25, 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-3765 and 05-4198

TRAFFORD DISTRIBUTION CENTER,
Petitioner in No. 05-3765

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

NATIONAL LABOR RELATIONS BOARD,
Petitioner in No. 05-4198

v.

LIBERTY SOURCE W, LLC AND ITS ALTER EGO,
TRAFFORD DISTRIBUTION CENTER,
Respondent

On Petitions for Review and Enforcement of a
Decision and Order of the
National Labor Relations Board
(NLRB Case Nos. 6-CA-33661 and 6-CA-33729)
Administrative Law Judge: Paul Bogas

Argued on December 4, 2006
BEFORE: RENDELL, and AMBRO, Circuit Judges,
and BAYLSON*, District Judge
(Filed February 26, 2007)

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* Honorable Michael M. Baylson, Judge of the United

States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

RENDELL, Circuit Judge.

Before the Court is a petition for review of a decision by the National Labor Relations Board ("NLRB") holding that Trafford Distribution Center ("Trafford") is the alter ego of Liberty Source W, LLC ("Liberty"). Liberty, whose primary business was printing and digital services, also provided a small amount of warehousing services. When Liberty fell on hard times financially, the secured lender took possession of its assets. Thereafter several former employees continued the warehousing business under the auspices of a new entity, Trafford. After Trafford formed, it declared that it would not honor the collective bargaining agreements that existed between Liberty and

two unions, the Federation of Independent Salaried Unions ("the Federation") and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO ("the IUE"). The unions brought an action before the NLRB based on alleged violations of the National Labor Relations Act ("NLRA").

The Board affirmed the holding of the ALJ that Trafford was the alter ego of Liberty, and that as a result Trafford was bound by the collective bargaining agreements in place between Liberty and the unions. Trafford petitions for review, arguing that the decision by the Board lacked substantial evidence and contained an error of law with regard to the application of the alter ego test. Having reviewed both challenges and found them unavailing, we will affirm the decision of the Board.

FACTUAL AND PROCEDURAL HISTORY

A. Factual History

Liberty was formed by Joseph Wortley in 1998. It at one time employed 120 people, had sales in excess of $17 million, and was the second-largest printer in the Pittsburgh region. Liberty had other divisions in addition to its printing division. It offered "e-source" (i.e. digital) services, including web design and CD-ROM production, in addition to software development. A small part of its business was also devoted to warehousing ("the warehouse/fulfillment operation"). Customers such as Heinz Co. shipped materials to be held at Liberty's warehouse and Liberty shipped them out as orders and invoices were received. Roughly 98% of Liberty's business was devoted to printing or e-source services; 1-2% of the business was devoted to warehousing. Approximately 6 of the 120 people who worked at Liberty at its inception worked in the warehouse operation. App. 89.

The employees were represented by two unions, the Federation and the IUE. The salaried employees were represented by the Federation; the IUE represented the

hourly workforce. Beginning in 2002, Liberty began experiencing financial difficulties. It was unable to repay its debt and eventually its principal lender, Independence Community Bank ("Bank"), filed a complaint in mortgage foreclosure seeking over $1.8 million from Liberty. Liberty ultimately surrendered all of its assets to the Bank on September 2, 2003.

The next day, September 3, 2003, the managers at Liberty were notified by Liberty President Richard Carmody that the assets had been surrendered, and that Liberty was to halt all operations and send the employees home. The unions did not receive advance notice that Liberty was going to terminate employees and cease operations. Nor were the unions given the opportunity to negotiate over those actions or their effects. Meanwhile, the CFO of Liberty, Patrick Manderfield, advised the Bank that Liberty's value as a going concern was greater than its liquidation value, hoping that the Bank would continue operating Liberty. The Bank declined to do so and chose to liquidate the company. Most of Liberty's assets were auctioned off.

After the surrender of assets, the printing and e-source business quickly disappeared. However, Heinz Co. inquired whether Liberty could keep its inventory at the Trafford, PA facility and resume the fulfillment services there. Joseph Wortley notified Liberty's former management staff that if they could create a viable business comprised solely of warehouse/fulfillment services, he would sell it to them for $1. The staff declined. But they agreed to formulate a business plan for operating a warehouse/fulfillment business. Sometime later, Barbara Wortley, wife of Joseph Wortley, agreed to back the endeavor with a $25,000 equity investment. She later extended a $17,000 loan to the new entity, Trafford.

Trafford, needing equipment, relied on an appraiser (Graphtek, Inc.) to assess the value of the items in the hands of the Bank that were located at the Trafford, PA site. Trafford ultimately paid the Bank $27,000 for rack shelving, hand trucks, cabinets, office chairs, desks,

pictures, and computer equipment. App. 367-68.[1] The Trafford facility resumed operations on September 9, 2003, before Trafford itself was even incorporated. App. 23. Three of Liberty's four managers constituted the management at Trafford. Ten of the twelve Trafford employees were previously employed by Liberty. Nearly all of Trafford's initial customers were former Liberty customers. Liberty's non-warehouse customers did not become customers of Trafford. Trafford also began a new service: leasing out portions of its facility to AGX International. Trafford's leasing service accounted for less than one percent of Trafford's business. App. 23.

Shortly after Trafford was created, former Liberty employees Leonard Manganello (former manager of the plant) and Pat Manderfield (former CFO) began hiring Trafford's employees. The employees were selected without regard to the seniority provisions in Liberty's contracts with the unions. Trafford established new wage rates, benefit levels, and other conditions of employment. The unions demanded that Trafford abide by the duties set forth in the collective bargaining agreements to which Liberty was a party. Trafford refused and the unions filed charges against Liberty and Trafford alleging violations of Sections 8(a)(1) and 8(a)(5) of the NLRA. Specifically, the unions claimed that Liberty and Trafford were alter egos and that they violated the NLRA by failing to bargain before ceasing operations, terminating the employment of union-represented individuals without bargaining, and setting new wages and terms and conditions of employment for recalled workers.

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1 The ALJ's decision found that the purchase of the equipment was not finalized until May 2004. Additionally, it found that the $27,000 was not to be paid in cash, but was to be deducted from an amount Trafford's employees Leonard Manganello and Pat Manderfield stated the Bank owed them for services rendered. The ALJ stated that the "record does not clarify what services Manganello and Manderfield had rendered to the Bank or why the Bank owed Trafford for space." App. 23.

At the time of the ALJ proceeding, Trafford had a total of twelve employees. Ten were full-time and two were part-time. Ten of the twelve were previously employed by Liberty. App. 24. Liberty never officially dissolved, nor did it file for bankruptcy. App. 23.

B. Procedural History

The ALJ heard evidence in the case on July 19 and July 20, 2004. He issued his decision in November 2004. After describing the factual history, he noted the well-settled principle that employers may not avoid their duties under their employment contracts by "forming what appears to be a new company but is in fact a 'disguised continuance' or alter ego of the old company." App. 25 (quoting *Mar-Kay Cartage*, 277 N.L.R.B. 1335, 1340 (1985)). The ALJ then described the *Crawford Door* test, *see Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976), for finding that two companies are alter egos:

> In order to decide if two facially independent employers are alter egos, the Board considers whether the two entities have substantially identical ownership, management, supervision, business purposes, operation, equipment and premises, and customers. The Board also looks to whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act. No single one among these factors is determinative of alter ego status and not all the indicia need be present for the Board to conclude that a finding of alter ego status is appropriate.

App. 25 (citations and quotations omitted).

The ALJ proceeded to analyze the workings of Liberty and Trafford in light of these enumerated factors.

1. Management, Supervision, and Ownership

The ALJ noted that Trafford was wholly owned by Barbara Wortley, wife of Joseph Wortley, the owner of Liberty, and that the circumstances indicated that a true transfer of control did not result from Barbara Wortley's interposition. He noted that Joseph Wortley was the one who initiated discussions about continuing the warehouse/fulfillment operation in some form, and that Joseph Wortley arranged for a bank to provide special financing to Trafford on the basis of (yet unrealized) accounts receivable. The ALJ found that "the totality of the circumstances confirms that the real control of Trafford was with J. Wortley, not his wife. A strong showing of common ownership of Liberty and Trafford has been made." App. 25.

The ALJ concluded that the record established that Liberty and Trafford had substantially identical management and supervision. He noted that three of Liberty's four managers became the management team at Trafford and that their supervisory duties did not change. "Every one of Trafford's managers had been a Liberty manager on September 3," the day Liberty informed its staff it would cease operations. App. 26. The ALJ found these facts to constitute a "strong showing" of substantial identity in management. *Id.*

2. Equipment and Customers

The ALJ concluded that there was substantial identity of equipment and customers. Trafford used the same premises Liberty had occupied until September 3, 2003; Trafford purchased from the Bank the same exact equipment that Liberty's warehouse had used; all of Trafford's initial customers were Liberty customers; and 98% of Trafford's revenues over the first eight months were from companies formerly doing warehousing business with Liberty. The ALJ accordingly found that Liberty and Trafford shared substantially identical equipment and customers.

3. Motivation

The ALJ first noted that a showing of improper motive is not necessary to a finding of alter ego status under *A&P Brush Mfg. Corp.*, 323 N.L.R.B. 303 (1997). The ALJ also considered it "implausible that J. Wortley would sacrifice the printing and e-source operations that constituted over 90 percent of Liberty's business for the purpose of freeing the warehouse/fulfillment operation from its labor law responsibilities." App. 26.[2] But the ALJ did take note of how Trafford came into existence. The ALJ noted that the decision to create Trafford as the vehicle for continuing the business could have been motivated by a desire to avoid the obligations of the collective bargaining agreements.

The ALJ also stated that he had little evidence upon which to base a decision as to the purpose in forming Trafford. Joseph Wortley did not testify, nor did Barbara Wortley or Richard Carmody, the President of Liberty, and the ALJ drew an adverse inference from the failure of the Wortleys to testify.[3] The ALJ noted what he called the "transparent ploy" of designating Barbara Wortley the owner. And he saw evidence of an improper motive in Liberty's failure to inform the union about the decision to suspend Liberty's operations and surrender assets, as well as the failure to bargain over the effects of ceasing Liberty's operations. The ALJ also pointed to the fact that Carmody refused to accept or process labor grievances as the President of Liberty after September 3, 2003. These factors led the ALJ to conclude that "a desire to avoid labor law obligations was a motivation for those actions." App. 27. He noted that it might have been just one of several desires of Liberty and Wortley in continuing Trafford, but it was a legally significant desire all the same. App. 27 n.12.

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[2] The ALJ added, "As Respondent's counsel suggested during trial, that would not be the tail wagging the dog, but the 'tip of the tail' wagging the dog." App. 26.

[3] No claim was made that they were unavailable.

4. Business Purposes and Operations[4]

The ALJ deemed the question of substantially identical business purposes and operations a closer call. It noted that the warehouse business was a small portion of Liberty's overall portfolio (1-2% of the total). But the entirety of Trafford's business consisted of continuing Liberty's warehouse/fulfillment component. Additionally, Liberty's operation remained complete and functioning during the transition from Liberty to Trafford, "without a significant hiatus." App. 26. "The record shows that on September 8, Trafford simply took over the same work, on the same orders, for all the same customers that Liberty's warehouse/fulfillment operation had serviced until September 3." *Id.*

The ALJ was "given pause" by the fact that Trafford continued only a very small part of Liberty's overall business, and stated that neither party "has identified any decisions where the Board has considered whether under such circumstances substantial identity of business purpose and operation exists for purposes of the alter ego analysis." App. 26. But the ALJ found roughly analogous precedent in cases involving successorship, where it noted that the Board "found sufficient commonality of ownership where even a small portion of the original company's business is transferred to the new enterprise, but a majority of the new enterprise's employees are from the predecessor's bargaining unit." *Id.* Based on that precedent and the facts available, the ALJ found that Trafford and Liberty had substantially similar business purposes and operations.

The ALJ concluded his analysis by stating that on the basis of these factors, he found that Trafford and Liberty

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[4] The parties, the ALJ, and the Board analyzed "business purposes and operations" as a single factor and given no reason to deviate from that approach, we will do the same. *See NYP Acquisition Corp.*, 332 N.L.R.B. 1041 (2000) (noting that in the usual case, business purpose will be "similar to business operation").

are alter egos. "To sum up, the evidence shows that J. Wortley closed the warehouse\fulfillment business he owned late on a Wednesday, and resumed that warehouse\fulfillment business on the following Monday as a new enterprise at the same location with the same clients, and essentially the same managers, but without recognizing the Unions or applying the existing collective bargaining agreements." App. 27.

In a portion of the ALJ opinion not appealed by Trafford, the ALJ then found that Trafford had violated sections 8(a)(5) and 8(a)(1) of the NLRA. He based his holding on the actions taken by Liberty before, during, and after Liberty's cessation of operations, as well as on the actions taken by Trafford in failing to meet the obligations of Liberty's labor agreements with the unions.

C. NLRB Decision

In a July 22, 2005 decision by the NLRB Board (a panel comprised of Chairman Battista and Members Liebman and Schaumber), the Board affirmed the ALJ ruling. The panel stated that in "agreeing with the [ALJ] that Trafford is n alter ego, Chairman Battista, and Member Schaumber find it unnecessary to pass on the judge's finding that Trafford and Liberty Source had substantially identical business purposes and operations." App. 16 n.1. Similarly, the panel stated that in affirming the ALJ's finding as to the purpose behind the creation of Trafford, it was not relying on the adverse inference the ALJ drew from the failure by Trafford to call the Wortleys to testify. The decision by the panel noted that one of the panel members, Chairman Battista; "adheres to his position that the General Counsel must show, inter alia, an intent to avoid legal obligations under the Act in order to prove alter ego status. However, recognizing that under extant Board law, unlawful motivation is not a necessary element of alter ego finding . . . Chairman Battista concurs with his colleagues in the finding of alter ego." App. 16.

After affirming that finding and the ALJ's finding that

Trafford and Liberty engaged in unfair labor practices, the Board imposed an order designed to remedy the harm caused. This included an obligation to pay terminated employees back pay, reinstate certain employees, and comply with the terms of the collective bargaining agreements.

PETITION FOR REVIEW

Trafford timely appealed the Board's decision. Trafford's challenge to the Board's decision is confined to the alter ego issue. Specifically, Trafford claims that the alter ego finding lacked substantial evidence, and that the Board committed legal error by failing to consider whether Trafford and Liberty had substantially identical business purposes. Trafford does not attack the findings regarding violations of sections 8(a)(1) and 8(a)(5).

In challenging the alter ego finding, Trafford argues that the companies are not owned by the same individual; that the composition of the Trafford management, though it overlaps with the Liberty management, performs different jobs; that there was no purpose to evade labor law obligations; and that "[m]ost importantly, the character and nature of the two businesses is substantially and materially different." Petr.'s Br. 15. Trafford also argues that the Board failed to apply the proper legal standard when it refused to consider whether Trafford and Liberty had substantially identical business purposes and operations.[5]

JURISDICTION

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[5] The NLRB filed a cross-application for enforcement of the Board's order. With respect to Liberty, the NLRB claims that the Board is entitled to summary enforcement against Liberty because it failed to file an answer to the complaint, appear at the Board hearing, file exceptions to the ALJ decision, or file an answer or brief with the Third Circuit. We will grant enforcement, as noted below.

The Board had jurisdiction over the case pursuant to Section 10(a) of the NLRA. 29 U.S.C. § § 151, 160(a). We have jurisdiction over the appeal from the Board's decision pursuant to Sections 10(e) and 10(f) of the Act. 29 U.S.C. § 160(e)-(f).

STANDARD OF REVIEW

The Court reviews the decision of the Board to determine whether there is substantial evidence in the record as a whole supporting the its finding. *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994) ("[W]e must . . . accept the Board's factual determinations and reasonable inferences derived from factual determinations if they are supported by substantial evidence."); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). "Where the Board adopts the ALJ's findings of fact and conclusions of law, it is the ALJ's determinations that we review." *SCA Tissue N. Am. LLC v. NLRB*, 371 F.3d 983, 988 (7th Cir. 2004). Where the Board has adopted the ALJ's decision in part, the Court reviews both. *See NLRB v. Greensburg Coca-Cola Bottling Co.*, 40 F.3d 669, 670 (3d Cir. 1994).

DISCUSSION

Trafford acknowledges that the key factors in an alter ego analysis are whether the two organizations have substantially identical "management, business purpose, operation, equipment, customers and supervision, as well as ownership." Crawford Door Sales Co., 226 N.L.R.B. 1144, 1144 (1976). Our decision in Stardyne, Inc. v. NLRB, 41 F.3d 141 (3d Cir. 1994), noted that "[t]he Board does not require the presence of each factor to conclude that alter ego status should be applied." Id. at 146. We conclude that the relevant factors, taken in the aggregate, weigh against Trafford.[6]

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[6] Trafford argues that both the ALJ and the Board failed to recognize and evaluate an additional "important factor," the negotiations and formalities surrounding the transactions creating the new entity, and that as a result, the alter ego finding is not supported

A. Management, Supervision, and Ownership

Trafford acknowledges that substantially identical ownership may be found where two enterprises are owned by members of the same family. It also acknowledges that the management and ownership of Trafford is "similar to that of Liberty." Petr.'s Br. 27. But Trafford argues that this is "insufficient by itself to support an alter ego finding," *id.*, which is essentially an irrelevant point because the Board did not rely solely on the management and ownership of Trafford. The role of Mrs. Wortley as owner weighs against Trafford.

The ALJ held that "most of the management team that ran Liberty became managers of Trafford, and every one of Trafford's managers had been a Liberty manager on September 3. This constitutes a strong showing of substantial identity in management." App. 26. Trafford claims that the Board failed to consider substantial evidence indicating that the tasks performed by its managers are different from those performed when they were at Liberty. The thrust of this claim is that Trafford is a small "mom and pop business" where managers also work in the warehouse area shipping the materials, and that even if the managers are the same and bear the same titles, they should be considered different from Liberty because their tasks are different. The task distinctions did not alter the supervisory duties of the managers, nor does Trafford cite to any case where the NLRB or a court found that the management–despite being composed of the same management personnel–was different for alter ego purposes due to changes in tasks performed. The

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by substantial evidence. Petr.'s Br. 24. While the NLRB has on occasion considered negotiations and formalities when weighing alter ego, *see, e.g., United Bhd. of Carpenters and Joiners of Am., Local No. 745*, 312 N.L.R.B. 903, 909 (1993); *A-1 Schmidlin Plumbing & Heating Co.*, 284 N.L.R.B. 1506, 1513 (1987), it is not a required factor in the alter ego framework. Moreover, in this case the overwhelming weight of the factors articulated by the NLRB in *Crawford Door, supra*, supports the result reached by the Board.

management and supervision factors weigh against Trafford.

B. Equipment and Customers

Trafford points to the differences between its business and the printing and e-source services Liberty performed in an attempt to draw a distinction between Trafford and Liberty's customers and equipment. It also attempts to ignore the fact that the equipment used in running Trafford's warehouse/fulfillment business and Liberty's warehouse/fulfillment business is not only substantially identical but in many cases is the very same equipment.

Trafford's current business is run with the equipment purchased from the Bank that Liberty had turned over as its assets (equipment which never left the Trafford site and was purchased by Trafford). There was also evidence that Trafford did not pay for the equipment for many months, as well as evidence that Trafford did not have to pay rent to lease the premises for several months. This evidence weighs against Trafford's contentions.

Trafford also takes issue with the portion of the Board's decision in which it "erroneously assumed that the relevant time frame for comparing Liberty and Trafford's respective customers is limited to the days immediately following Liberty's closure and Trafford's start up." Petr.'s Br. 23. Trafford believes that it is more appropriate to focus on the "entire period following Trafford's creation." *Id.* However, it presents no evidence indicating that this broader period would be different. Nor does Trafford dispute the ALJ's finding that 98% of Trafford's customers were formerly Liberty customers, and that Trafford's new venture (which differed from Liberty's warehousing business model) comprised less than one percent of its revenues. App. 23. The NLRB aptly notes that "Trafford never moved to supplement the record with evidence showing that its customer base had changed substantially since the hearing." Respondent's Br. 22. The factors of equipment and customers weigh against Trafford.

C. Motivation

Trafford contends that there is no evidence that Trafford was formed with anti-union purpose. "Trafford was not created as a disguise. It was not formed to evade any labor obligations." Petr.'s Br. 25. Trafford claims that the "fact that Liberty was irrefutably in default at the time that it ceased operations and turned over its assets to the Bank" also weighs against a finding of alter ego. None of these facts suggest that the ALJ's decision lacked substantial evidence. Trafford also argues that the factor of motivation is a "critical variable" under *NLRB v. Omnitest Inspection Services, Inc.*, 937 F.2d 112 (3d Cir. 1991), and that "the Board's unwillingness to even consider this factor strongly suggests that its findings are not supported by substantial evidence." Petr.'s Br. 27. In fact, it is clear that the Board did affirm the finding as to improper motivation. The only aspect of the ALJ's decision as to motivation that the Board rejected was the inference drawn from the lack of testimony by the Wortleys. This factor weighs against Trafford, if only slightly.

D. Business Purposes and Operations

The business purposes and operations factor is one which gives us pause, as it did the ALJ and the Board. Trafford calls the Board's "most glaring error" the Board's failure to "recognize the undeniable fact that the business purpose of Trafford is separate of that of Liberty. Liberty was a printing operation. Trafford is a warehousing company. Trafford does no printing." Petr.'s Br. 20. Trafford cites to our decision in Stardyne, Inc., v. NLRB, 41 F.3d 141 (3d Cir. 1994) for its statement that the "main focus of the inquiry is to determine whether the two employers are the same business in the same market," id. at 151,7 and Trafford's claim boils down to the assertion that because Trafford bears a resemblance only to a tiny portion of Liberty's overall business portfolio, Trafford is not "the same business in the same

market." Therefore, Trafford contends, it cannot be considered Liberty's alter ego.[7]

The Board found that substantial evidence supported the finding that Trafford and Liberty are alter egos even without taking into consideration the ALJ's finding that the two entities have substantially identical business purposes. App. 16. Under the alter ego jurisprudence, "[t]he Board does not require the presence of each factor to conclude that alter ego status should be applied." *Stardyne*, 41 F.3d at 146. Accordingly, the Board's finding did not need to rely on this factor, nor would it mean victory for Trafford had this factor been decided in Trafford's favor. Thus, Trafford faces the burden of showing that by deeming it "unnecessary to pass on" the ALJ's business purposes finding, the Board's decision lacks substantial evidence.[8]

The very cases Trafford cites for support of its argument that, by not "pass[ing] on" the business purpose

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[7] The Board has in prior cases described this factor as referring to whether the two entities "shared substantially the same business purpose *in whole or in part*." *Metro. Teletronics Corp.*, 303 N.L.R.B. 793, 798 (1991) (emphasis added); *see also Better Bldg. Supply Corp.*, 283 N.L.R.B. 93, 95 (1987) ("[A] reduction in the scope of operations has . . . been held ineffective [to deem the businesses legally distinct], (i.e., when the alter ego conducts far less business, a portion of the former business, serves a smaller market, etc.).") (footnote omitted); *William B. Allen*, 267 N.L.R.B. 700, 705 (1983) (standard is "whether the 'new' business is substantially the same, in whole or in part").

[8] The Board stated that "[i]n agreeing with the judge that Trafford is an alter ego, Chairman Battista and Member Schaumber find it unnecessary to pass on the judge's finding that Trafford and Liberty Source had substantially identical business purposes and operations." App. 16. We take this to mean that the holding by the Board neither affirms nor rejects the finding by the ALJ on that factor. The Board used more specific language when it stated that it "did not rely on the adverse inference the judge drew from the failure of the Respondents to call" the Wortleys to testify. *Id.* Accordingly, we read the Board as neither rejecting nor affirming the business purpose finding.

question, the Board lacked substantial evidence, undercut that argument. As we stated in *Stardyne* and the NLRB stated in *Sobeck Corp. & Roof Pro*, Inc., the presence of each alter ego factor is not necessary to conclude that an alter ego relationship exists. *See Stardyne*, 41 F.3d at 146 ("The Board does not require the presence of each factor to conclude that alter ego status should be applied."); *Sobeck Corp. & Roof Pro, Inc.*, 321 N.L.R.B. 259, 266 (1996) ("Roof Pro and Sobeck Corp. share six of the seven criteria delineated . . . ."). Even if the Board's decision rejected the identical business purpose finding by the ALJ (and it is not clear that it did, see n.8 *supra*), the evidence regarding ownership control, motive, equipment, customers, the facts of the transition period, and the composition of management personnel were sufficient in the Board's eyes to support the alter ego finding. Trafford cites to no precedent that holds that a specific finding as to business purposes is essential to the alter ego finding; indeed, *Stardyne* explicitly says that the presence of each factor is not necessary. *Stardyne*, 41 F.3d at 146.

Our canvass of NLRB decisions involving partially reconstituted businesses has uncovered cases where alter ego was found to be present despite a significant change in scope of the business. *See, e.g., NLRB v. Scott Printing Corp.*, 612 F.2d 783 (3d Cir. 1979); *Metro. Teletronics Corp.*, 303 N.L.R.B. 793 (1991); *Better Bldg. Supply Corp.*, 283 N.L.R.B. 93, 94 (1987); *William B. Allen*, 267 N.L.R.B. 700 (1983); *Custom Mfg. Co.*, 259 N.L.R.B. 614 (1981). We do acknowledge that we have found no case with facts as stark as these. Nevertheless, we agree with the Board and the ALJ that there is substantial evidence for the alter ego finding in light of analysis as to the other factors: the similarity in customers, managers, equipment, and warehouse location; the brevity of the transition period; and the anti-union inferences. While on a different set of facts an entity with such a minimal overlap in business purposes might appropriately be deemed outside the definition of alter ego, on these facts, where all the remaining alter ego factors point in a single direction, we have no difficulty affirming the Board's decision.

The Board has never used a bright-line test to quantify and assess the amount of business overlap. Instead it has looked to the facts on a case-by-case basis and balanced business purposes together with evidence of other similarities between the companies. The Board has latitude under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to adopt a test for alter ego, *see Stardyne*, 41 F.3d at 147-49 (finding the Board's alter ego test–which lacks a requirement of proof of anti-union intent–to be a reasonable interpretation of the NLRA under *Chevron*), and Trafford has not argued that the test is inconsistent with the NLRA under *Chevron*. Thus, we conclude that the Board's application of existing law to the facts of this case was supported by substantial evidence.

CONCLUSION

The decisions by the ALJ and the Board are supported by substantial evidence and the petition for review will be DENIED.

The NLRB has requested summary enforcement against Liberty in light of the fact that Liberty did not file an answer to the complaint, appear at the Board hearing, file exceptions to the ALJ decision, or appeal its decision. Under Rule 15(b)(2) of the Federal Rules of Appellate Procedure, "[w]ithin 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk." Fed. R. App. P. 15(b)(2). There is no indication that Liberty answered the NLRB's cross-petition for enforcement of the Board's order, and on that basis the petition for enforcement will be GRANTED.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

LIBERTY SOURCE W, LLC AND/OR TRAFFORD DISTRIBUTION CENTER, ITS ALTER EGO

AND

FEDERATION OF INDEPENDENT SALARIED UNIONS

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS-COMMUNICATIONS WORKERS OF AMERICA, LOCAL 601, AFL-CIO

Cases 6-CA-33661 and 6-CA-33729

July 22, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 24, 2004, Administrative Law Judge Paul Bogas issued the attached decision. Respondent Trafford Distribution Center filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[FN1] and conclusions as modified,[FN2] and to adopt the recommended Order as modified.

AMENDED CONCLUSIONS OF LAW

1. Respondent Liberty Source and Respondent Trafford are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Federation and the IUE are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents Liberty Source and Trafford are alter egos.

4. The Respondents violated Section 8(a)(5) and (1) of the Act by: terminating bargaining unit employees and partially closing their business without prior notice to the Federation and the IUE and without bargaining over the effects of the termination and the partial closure; refusing to recognize and bargain with the Federation and the IUE; failing to provide terminated unit employees with severance pay, accrued vacation pay, health care benefits, employee security and protection plan benefits, commissions due, and compensation to which they were entitled under the collective-bargaining agreements; failing to remit to the appropriate trust funds 401(k) pension moneys deducted from unit employees' pay; failing to select employees for reemployment in compliance with the collective-bargaining agreements; setting wages, benefits, and terms and conditions of employment for the returning unit employees that were inconsistent with the collective-bargaining agreements;

and by changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the Unions and without affording the Unions an opportunity to bargain.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondents have not violated the Act in any other manner except as specifically found herein.

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the Respondents' failure to bargain with the Federation and IUE over the effects of the Respondents' decision to partially close their business and to terminate all unit employees, we shall order the Respondents to bargain with the Unions, on request, about the effects of those decisions. Because of the Respondents' unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representatives at a time when the Respondents might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Unions. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the purposes of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining

position is not entirely devoid of economic consequences for the Respondents. We shall do so by ordering the Respondents to pay backpay to those terminated unit employees who were not offered reinstatement in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondents shall pay the terminated unit employees backpay at the rate of their normal wages when last in the Respondents' employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondents bargain to agreement with the Unions on those subjects pertaining to the effects of the partial closing of the business on their employees; (2) a bona fide impasse in bargaining; (3) the Unions' failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondents' notice of their desire to bargain with the Unions; (4) or, the Unions' subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondents partially terminated their operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondents shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondents' employ. Backpay shall be based on earnings which the terminated unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy the Respondents' failure to provide unit employees with severance pay, accrued vacation pay,

health care benefits, employee security and protection plan benefits, commissions due, and compensation because of the Respondents' failure to apply the terms and conditions of the collective-bargaining agreements, the Respondents shall be required to make the terminated unit employees whole in the manner set forth in *Ogle Protective Service*, 183 NLRB 682, 683 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

To remedy the Respondents' failure to remit to the appropriate trust funds 401(k) pension moneys deducted from unit employees' pay, we shall order the Respondents to make all contractually-required contributions to these funds that they have failed to make, including any additional amounts due to the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondents shall reimburse unit employees for any expenses resulting from their failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[FN3]

To remedy the Respondents' failure to select employees for reemployment in compliance with the collective-bargaining agreements, we shall order the Respondents to reinstate all unit employees whom the Respondents did not select for reemployment when the Respondents resumed the warehouse/fulfillment operation in September 2003, but who would have been offered reemployment had the Respondents selected employees in compliance with applicable collective-bargaining agreement provisions. The Respondents shall also make all such employees whole for any losses suffered by reason of the Respondents' failure to select them for reemployment in compliance with the collective-bargaining agreements. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, we shall order the Respondents to post the attached notice at their facility and to mail a copy to the Unions and to the last known addresses of any unit employees who were employed by the Respondents as of September 3, 2003, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondents, Liberty Source W, LLC and its alter ego, Trafford Distribution Center, Trafford, Pennsylvania, their officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Federation of Independent Salaried Unions (the Federation) and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the IUE), as the exclusive representatives of their employees in the appropriate units with respect to wages, hours, working conditions, or other terms and conditions of employment, and refusing to honor the collective-bargaining agreements applicable to employees in those units.

(b) Terminating bargaining unit employees and partially closing their business without first notifying the Federation and IUE and offering them an opportunity to bargain over the effects of the terminations and the partial closure.

(c) Failing to provide terminated unit employees with severance pay, accrued vacation pay, health care benefits, employee security and protection plan benefits, commissions due, and compensation to which they are entitled under the collective-bargaining agreements.

(d) Failing to remit to the appropriate trust funds 401(k) pension moneys deducted from unit employees' pay.

(e) Failing to select employees for reemployment in compliance with the collective-bargaining agreements.

(f) Setting wages, benefits, and terms and conditions of employment for the returning unit employees that are inconsistent with the collective-bargaining agreements.

(g) Changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the Federation and IUE and without affording them an opportunity to bargain.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Federation as the exclusive representative of the employees in the Federation bargaining unit concerning terms and conditions of employment.

(b) On request, bargain with the IUE as the exclusive representative of the employees in the IUE bargaining unit concerning terms and conditions of employment.

(c) Bargain with the Federation and the IUE over the effects on unit employees of the September 2003 employee terminations and the partial closure of the business.

(d) Pay backpay to the unit employees terminated in September 2003 as a result of the partial closure of the business, who are not offered reinstatement, in the manner set forth in the amended remedy section of this decision.

(e) Reinstate all unit employees whom the Respondents did not select for reemployment when the Respondents resumed the warehouse/fulfillment operation in September 2003, but who would have been offered reemployment had the Respondents selected employees in compliance with the applicable collective-bargaining agreement provisions, and make all such employees whole for any losses suffered as a result of the Respondents' failure to select them for reemployment in the manner set forth in the amended remedy section of this decision.

(f) Provide the unit employees terminated in September 2003 with the benefits to which they are entitled under the collective-bargaining agreements, including severance pay, accrued vacation pay, health care benefits, employee security and protection plan benefits, commissions due, contributions to employees' 401(k) pension funds, and compensation for work performed from September 1 to 3, 2003, in the manner set forth in the amended remedy section of this decision.

(g) Provide unit employees working for the Respondents after September 3, 2003, with wages, benefits, and terms and conditions of employment that are consistent with the terms of the collective-bargaining agreements, and make such employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' failure to adhere to the collective-bargaining agreements since September 3, 2003, in the manner set forth in the amended remedy section of this decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their facility in Trafford, Pennsylvania, copies of the attached notice marked "Appendix."[FN4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondents' authorized representative(s), shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. The Respondents shall also mail a copy of the notice to all employees in the units represented by the Federation and the IUE who were employed by the Respondents at the Trafford, Pennsylvania facility, as of September 3, 2003. The notice shall be mailed to the last known address of each of these employees after being signed by the Respondents' authorized representative(s).

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 22, 2005

Robert J. Battista
Chairman

Wilma B. Liebman
Member

Peter C. Schaumber
Member

FN1. There are no exceptions to the judge's findings

that Respondent Liberty Source W, LLC violated Sec. 8(a)(5).

The judge found that Trafford Distribution Center (Trafford) is the alter ego of Liberty Source W, LLC (Liberty Source). In support of this finding, the judge found that Trafford and Liberty Source had substantially identical ownership, management, supervision, business purposes, operations, equipment and premises, and customers. In agreeing with the judge that Trafford is an alter ego, Chairman Battista and Member Schaumber find it unnecessary to pass on the judge's finding that Trafford and Liberty Source had substantially identical business purposes and operations. See *Stardyne, Inc. v. NLRB,* 41 F.3d 141, 146 (3d Cir. 1994), citing *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984) (the Board does not require the presence of each factor to conclude that alter ego status should be applied).

In affirming the judge's finding that the purpose behind the creation of Trafford was to avoid legal obligations under the Act, we do not rely on the adverse inference the judge drew from the failure of the Respondents to call J. Wortley and B. Wortley to testify about the purposes motivating the decision to create Trafford.

Chairman Battista adheres to his position that the General Counsel must show, inter alia, an intent to avoid legal obligations under the Act in order to prove alter ego status. See *Crossroads Electric, Inc.*, 343 NLRB No. 112, slip op. at fn. 2 (2004). However, recognizing that under extant Board law, unlawful motivation is not a necessary element of an alter ego finding, and in the absence of a three-member Board majority to overrule extant Board law, Chairman Battista concurs with his colleagues in the finding of alter ego status.

FN2. The judge concluded, inter alia, that the Respondents violated Sec. 8(a)(5) and (1) by failing to provide terminated unit employees with severance pay,

accrued vacation pay, and compensation to which those employees were entitled under the existing collective-bargaining agreements. The judge also found that the record evidence did not demonstrate, as alleged in the complaint, that the Respondents failed to pay terminated employees' health care benefits, security and protection plan benefits, and commissions required by the applicable contracts, and failed to properly remit funds to the employees' pension funds. The General Counsel excepted to this finding. We find merit in the General Counsel's exception.

The benefits are set forth in and flow directly from the applicable contracts. Once a finding of alter ego relationship has been made, it follows that the collective-bargaining agreement of one employer is binding upon the other entity. See *Kodiak Electric Co.*, 336 NLRB 1038, 1042 (2001), enfd. mem. 70 Fed.Appx. 664 (4th Cir. 2003), citing *Watt Electric Co.*, 273 NLRB 655 (1984). Because Liberty Source and Trafford are alter egos, the collective-bargaining agreements between the Unions and Liberty Source are binding upon Trafford. Moreover, Trafford's Vice President of Finance Patrick Manderfield, testified that Trafford did not apply the terms of the applicable contracts to its new employees. Thus, the benefits at issue are the responsibility of both Liberty Source and Trafford and the record establishes that both have failed to honor the applicable contracts and pay the required benefits. We have modified the conclusions of law, remedy, recommended Order, and notice accordingly.

FN3. To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

FN4. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations

Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the Federation of Independent Salaried Unions (the Federation) and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the IUE), as the exclusive representatives of our employees in the appropriate units with respect to wages, hours, working conditions, or other terms and conditions of employment.

WE WILL NOT refuse to honor the collective-bargaining agreements applicable to you.

WE WILL NOT terminate you or partially close our business without first notifying the Federation and IUE and offering them an opportunity to bargain over the effects of the terminations and the partial closure.

WE WILL NOT fail to provide terminated unit employees with severance pay, accrued vacation pay, health care benefits, employee security and protection plan benefits, commissions due, and compensation to which they are entitled under the collective-bargaining agreements.

WE WILL NOT fail to remit to the appropriate trust funds 401(k) pension moneys deducted from unit employees' pay.

WE WILL NOT fail to select employees for reemployment in compliance with the collective-bargaining agreements.

WE WILL NOT set wages, benefits, and terms and conditions of employment for returning unit employees that are inconsistent with the collective-bargaining agreements.

WE WILL NOT change your wages, benefits, and terms and conditions of employment without prior notice to the Federation and the IUE and without affording them an opportunity to bargain.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, on request, bargain with the Federation as the exclusive representative of the employees in the Federation unit concerning terms and conditions of employment.

WE WILL, on request, bargain with the IUE as the exclusive representative of the employees in the IUE unit concerning terms and conditions of employment

WE WILL bargain with the Federation and the IUE over the effects on unit employees of the September 2003 employee terminations and the partial closure of our business.

WE WILL pay limited backpay to the unit employees terminated in September 2003 as a result of the partial closure of our business, who are not offered reinstatement.

WE WILL reinstate all unit employees whom we did not select for reemployment when we resumed the warehouse/fulfillment operation in September 2003, but who would have been offered reemployment had we selected employees in accordance with the applicable collective-bargaining agreement provisions. In addition, WE WILL make all such employees whole for any loss of earnings and other benefits suffered as a result of our failure to select them for reemployment.

WE WILL provide the unit employees terminated in September 2003 with the benefits to which they are entitled under the collective-bargaining agreements, including severance pay, accrued vacation pay, health care benefits, employee security and protection plan benefits, commissions due, contributions to employees' 401(k) pension funds, and compensation for work performed from September 1 to 3, 2003.

WE WILL provide unit employees working for us after September 3, 2003, with wages, benefits, and terms and conditions of employment that are consistent with the terms of the collective-bargaining agreements, and make such employees whole for any loss of earnings and other benefits suffered as a result of our failure to adhere to the collective-bargaining agreements.

LIBERTY SOURCE W, LLC AND/OR TRAFFORD DISTRIBUTION CENTER

Barton Meyers, Esq., for the General Counsel.

John B. Bechtol, Esq, (Bechtol, Lee & Eberhardt), Pittsburgh, Pennsylvania, for the Respondent Trafford Distribution Center.

PAUL BOGAS, Administrative Law Judge.

DECISION

STATEMENT OF THE CASE

This case was tried in Pittsburgh, Pennsylvania, on July 19 and 20, 2004. The Federation of Independent Salaried Unions (the Federation) filed the initial charge in Case 6-CA-33661 on September 11, 2003, and amended that charge on October 15, 2003, and December 18, 2003. The International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the IUE), filed the charge in Case 6-CA-33729 on October 21, 2003, and an amended charge on December 18, 2003. On December 30, 2003, the director of Region 6 of the National Labor Relations Board issued the complaint. The complaint alleges various Section 8(a)(5) and (1) violations arising out the decision of Liberty Source W, LLC (Liberty) to suspend operations and surrender its assets to a creditor, and the subsequent resumption of a portion of Liberty's operations by a newly incorporated entity designated Trafford Distribution Center (Trafford). The complaint alleges that Liberty and Trafford are alter egos and/or a single employer and that they violated Section 8(a)(5) and (1) of the National Labor Relations Act in by, inter alia, failing to bargain before ceasing operations, terminating the employment of represented individuals without bargaining, and setting new wages and terms and conditions of employment for recalled workers. Among the other allegations are that Liberty and/or Trafford violated Section 8(a)(5) and (1) when, after terminating unit employees, they failed to pay

those employees severance benefits, back wages, accrued vacation pay, and other moneys provided for under the applicable collective-bargaining agreements. Trafford filed a timely answer in which it denied that Liberty and Trafford were either alter egos or a single employer, and also denied that Trafford committed any of the violations alleged in the complaint. No answer was filed by any person or entity purporting to represent Liberty.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Trafford, I make the following rulings, findings of fact, and conclusions of law.

General Counsel's Motion for Partial Default Judgment

At the start of trial, the General Counsel moved that all allegations regarding Liberty be deemed admitted because Liberty had not filed an answer to the complaint. Counsel for Trafford (Liberty's alleged alter ego) opposed the motion and I took the matter under advisement. I now grant the motion to the extent indicated below.

The record in this case shows that the complaint was served on Liberty at its principal office and place of business on December 31, 2003, and January 6, 2004.[FN1] The file contains return receipts showing that the complaint was received. It is undisputed that no party purporting to represent the interests of Liberty ever filed an answer to the complaint. The record also shows that the complaint was received by Trafford-an entity that is doing business at the same address where Liberty operated and whose managers had all been managers of Liberty. The office of John B. Bechtol, Esq.-the attorney who appeared in this proceeding on behalf of Trafford-also received the complaint. Trafford answered the complaint in a timely fashion. In its answer, Trafford explicitly denied that it was responding on behalf of Liberty, and on that basis refused to respond to certain allegations regarding Liberty. However, Trafford's answer was not consistent in this regard, and it explicitly denied, upon

"knowledge and belief," other allegations relating to Liberty.

At trial, no counsel claiming to represent Liberty was present to take a position regarding the General Counsel's motion. However, Attorney Bechtol was present and, while continuing to maintain that he represented only Trafford, opposed the General Counsel's motion regarding Liberty, and made various representations about the status of that entity. He stated that Liberty had been given over "lock, stock, and barrel," to the company's principal secured creditor-Independence Community Bank (the Bank).[FN2] Bechtol stated that Liberty had been "in essence liquidated," and that the Bank was the "interested party" on behalf of Liberty. The General Counsel countered that the Bank was simply a creditor of Liberty, which had never operated the business or become an employer of Liberty's employees. Counsel for the General Counsel stated that Liberty had made the decision to surrender its assets to the Bank, and that the Bank had not initiated the surrender. In its brief the General Counsel accurately notes that there is no record evidence that Liberty has been dissolved as a corporate entity.

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint will be deemed admitted if no answer is filed within 14 days from service of the complaint, unless good cause is shown. See also *OK Toilet & Towel Supply, Inc.*, 339 NLRB 1100 (2003). In addition, a complaint allegation is deemed to be admitted pursuant to Section 102.20 if an answer is filed, but that answer does not deny or explain the allegation, unless the answer states that the party is without knowledge. Regarding Trafford's argument based on Liberty's financial status, the Board has long held that liquidation does not shield a respondent from the obligation to file a timely answer. See *Valiant Metal Products*, 244 NLRB 1049 (1979). Similarly, the Board has refused to relieve respondents of the obligation to file an answer when those respondents have ceased operations or filed for bankruptcy. *OK Toilet & Towel*, 339

NLRB 1100, 1101 (2003); *Miami Rivet of Puerto Rico*, 307 NLRB 1390, 1391 fn. 2 (1992); *Community Health Plan*, 306 NLRB No. 10 (1992) (not reported in Board volumes); see also *Holt Plastering, Inc.*, 317 NLRB 451, 452 (1995) (Board holds that employer was not excused from filing an answer to compliance specification, even though employer notified the Board it had "ceased operations and liquidated the plant facilities"). Even assuming that Liberty had been liquidated, I conclude that "good cause" has not been shown for Liberty's failure to file an answer to the complaint.

Based on Section 102.20 and the Board precedent cited above, I deem the complaint allegations regarding Liberty to be admitted, to the extent that those allegations are not denied or explained in the answer that Trafford filed.

FINDINGS OF FACT

I. JURISDICTION

During the 12-month period ending August 31, 2003, Liberty, a corporation with an office and facility in Trafford, Pennsylvania, (the facility) conducted printing, web design, and warehouse and distribution operations. In conducting those operations during that period, Liberty received at the facility goods valued in excess of $50,000 directly from points outside Pennsylvania, and provided goods and services valued in excess of $50,000 to customers located outside Pennsylvania. During the same period, Liberty purchased and received at its facility goods valued in excess of $50,000 from other enterprises located within Pennsylvania, each of which enterprises had received these goods directly from points outside Pennsylvania. Liberty admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Since commencing its operations on September 8, 2003, Trafford, a corporation operating at the same

facility in Trafford, Pennsylvania, has conducted warehouse and distribution operations. In conducting these operations, Trafford has provided services valued in excess of $50,000 to Heinz, U.S.A., an enterprise within Pennsylvania, which is directly engaged in interstate commerce. On a projected basis for the 12-month period commencing on or about September 13, 2003, Trafford will provide services valued in excess of $50,000 to Heinz, U.S.A. Trafford admits, and I find, that at all material times since on or about September 13, 2003, Trafford has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Trafford and Liberty admit, and I find, that the Federation and the IUE (the Unions) are both labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Until September 3, 2003, Liberty provided customers with printing services, internet-related services (also referred to as "e-source" services), and warehouse/fulfillment services,[FN[FN3]] at its facility in Trafford, Pennsylvania. By far, the greatest portion of Liberty's business was generated by the printing operation. In the months leading up to September 3, about 80 to 90 percent of Liberty's business was generated by the printing operation, about 5 percent by the e-source operation, and about 1 to 2 percent by the warehouse/ fulfillment operation.[FN4] Of the company's 110 employees, most-80 to 85- worked for the printing operation. The printing employees included pressmen, press operators, bindery and refinishing workers, and customer service estimators. Approximately six employees worked in the warehouse/fulfillment operation as warehousemen who received materials, picked and packed items kept in the warehouse, and shipped products. Shortly before September 3, Liberty obtained new warehouse/fulfillment business from the Heinz Company, and it was expected

that this work would triple the total volume of the Respondent's warehouse/fulfillment business; however, that would still leave the warehouse/ fulfillment operation with less than one-tenth the sales volume of the printing business.

Joseph Wortley (J. Wortley) owned Liberty. Richard Carmody was the company's president, and he also served as chief spokesperson for the company in contract negotiations and other dealings with the Federation and the IUE.[FN5] Patrick Manderfield was Liberty's chief financial officer, Leonard Manganello its vice president of operations, Ronald D'Andrea a manager, and Nellie Mae Shenefelt its human resources manager. Another of J. Wortley's companies-Liberty Properties at Trafford, LLC (Liberty Properties)-owned the Trafford facility from which Liberty conducted its operations. At all material times, the Federation has been the collective-bargaining representative for a unit composed of salaried employees of Liberty, and the IUE has been the collective-bargaining representative for a unit composed of hourly and maintenance employees of Liberty. The Federation and the IUE had collective-bargaining agreements with Liberty, and those contracts, with the extensions agreed to in writing by the parties, did not expire until January 31, 2004.

The 2 years leading up to September 3, 2003, were not good ones for Liberty financially, and the company was having difficulty paying several of its suppliers. J. Wortley tried to refinance Liberty's loan with its principal creditor, Independence Community Bank, in order to obtain a lower interest rate, but those efforts failed. A series of disagreements between J. Wortley and the Bank led to the deterioration of their relationship and in July 2003 the Bank filed a legal action against Liberty Properties, the J. Wortley Company that owned the facility where Liberty was operating. J. Wortley also had a contentious relationship with one of its vendors, and, on August 27, 2003, that vendor obtained a federal court judgment of $291,585.25 against Liberty.

B. Cessation of Liberty's Operations

On Wednesday, September 3, 2003, J. Wortley, through counsel, notified the Bank that Liberty was surrendering its collateral.[FN6] Under Liberty's loan agreement with the Bank, that collateral included all of the company's equipment, inventory, accounts receivable, contracts, and other personal property. The loan agreement also provided that Liberty "remain[ed] liable" for the performance of each contract it had entered into with third parties" and that "[t]he Bank shall not have any obligation or liability under any Contract [of Liberty] ... nor shall the Bank be required or obligated in any manner to perform or fulfill any of the obligations of the Borrower under or pursuant to any Contract." (GC Exh. 9 at p. 13, par. 3.2(a).) On September 3, Carmody informed Manderfield, Manganello, and D'Andrea about the surrender of collateral and directed them to shutdown Liberty immediately. After the meeting, Manganello began contacting Liberty's employees to advise them not to return to work the next day.

Neither J. Wortley nor Carmody, nor anybody else from Liberty, gave the Federation or the IUE advance notice that J. Wortley would be surrendering the company's assets, ceasing operations, and terminating employees, nor were the Unions given an opportunity to negotiate over those actions or their effects. George Kundrick, a longtime employee of Liberty and a Federation representative who helped negotiate the contract, did not find out anything about J. Wortley's actions until 8 p.m. on September 3, when Manganello called him and stated that J. Wortley was having problems with the Bank and that the facility would not be open on September 4. The next day, Manganello called Kundrick again and informed him that the plant would be closed indefinitely. Damian Testa, the Federation's president, did not find out that the plant would close until Kundrick told him. Richard "Rick" Zahorchak, president of the IUE and an employee of Liberty, found out that the company was closing on September 3 at about 10 p.m., when Manganello contacted him by phone with

instructions not to report for work until further notice. Manganello informed Zahorchak that Carmody told him to close the operation.

After Carmody informed Manderfield that J. Wortley was surrendering Liberty's assets to the Bank, Manderfield contacted Robert Craig, an official with the Bank, for guidance about how to proceed. Craig responded that he was caught off-guard by J. Wortley's actions and had to consult with the Bank's attorneys before he could give Manderfield any guidance. Manderfield and the Bank had discussions about the possibility of resuming operations, perhaps by selling Liberty to an interested buyer, but on September 8 or 9, 2003, Manderfield was informed that the Bank would not operate the business.[FN7] There is no evidence that the Bank ever operated Liberty, although it hired one former Liberty employee, Becky Quinlin, to help it collect amounts that Liberty was owed by its customers.

C. Resumption of Warehouse / Fulfillment Operation and Creation of Trafford

In the meantime, the owner and managers of Liberty considered whether it would be practical to resume some element of the company's operation at the facility. On September 5, 2003,-2 days after surrendering the company's assets to the Bank-J. Wortley held a telephone conference with Carmody, Manderfield, Manganello, and D'Andrea. During that conference, J. Wortley raised the possibility that the warehouse/fulfillment business could be a viable operation on its own. He told Manderfield, Manganello, and D'Andrea that if they prepared a workable business plan to continue the warehouse/fulfillment business he, or his family, would finance it and set up a new company. That same day, Manderfield, Manganello, and D'Andrea formulated a business plan that discussed anticipated revenues, staffing needs, pay and benefits, and rent on the location. J. Wortley's wife, Barbara Wortley (B. Wortley), made a financial contribution of $25,000 to the business and also a loan of about $17,000, and was designated the owner of

the enterprise. In addition, J. Wortley established a special financing arrangement for the business under which a bank in New Jersey would advance money to the company on the basis of invoices that the company issued to customers, even though the customers had not yet paid what they owed. The following Monday, September 8, 2003, the warehouse/fulfillment operation was resumed by this provisional entity. On September 23, 2003, the resumed warehouse/fulfillment operation was incorporated as Trafford.

The rent on the property occupied by Trafford, which was due to J. Wortley's company-Liberty Properties-was $12,000 per month in 2003, and $10,500 a month in 2004. For at least some period of time, Trafford did not actually pay the rent to Liberty Properties, but, apparently, accrued an obligation to do so. The rent covered the entire premises of Liberty's operation, not just the portion dedicated to the warehouse/fulfillment operation. Trafford has generated some revenues by renting out portions of the facility that it does not require for the warehouse/fulfillment operation.

In October 2003, Trafford reached an agreement with the Bank to buy the equipment, formerly owned by Liberty, that was necessary to the warehouse/ fulfillment operation, although it does not appear that the sale was finalized until May 2004.[FN8] Trafford Distribution Center Exhibit (TDC Exh.) 6. Trafford's letter offering to purchase the equipment for $27,000, indicates that it was not proposing to pay that amount to the Bank, but rather to take the equipment in exchange for $27,000 the Bank owed Trafford "for services rendered ... by [Trafford] employees Len Manganello and Pat Manderfield and for the use of space by [the Bank] for the period September 4, 2003, through November 30, 2003." TDC Exh. 4. The record does not clarify what services Manganello and Manderfield had rendered to the Bank or why the Bank owed Trafford for space. Liberty's printing and internet businesses were never resumed, and the Bank sold the rest of Liberty's equipment to other buyers at an auction in November 2003. The record does not show that Liberty

was ever formally dissolved as a corporate entity, or, if so, when such action took place. Indeed, no party in this proceeding has alleged that a formal dissolution has taken place. Likewise, there is no evidence, or allegation, that Liberty filed for bankruptcy.

When Trafford restarted the warehouse/fulfillment operation, all of its initial customers were customers of Liberty. During the period from September 2003 to May 2004, the vast majority of Trafford's business-over 98 percent- came from customers that had been customers of Liberty prior to September 3. At the same time, many of Liberty's customers never became customers of Trafford since those customers had used Liberty for printing and e-source services, neither of which Trafford provides. In March or April 2004, Trafford began to augment its revenues by leasing out portions of the facility to a company called AGX International. The leasing business is one that Liberty apparently had not been involved with, and it accounts for less than one percent of Trafford's business.

D. Trafford Disclaims Liberty's Collective-Bargaining Agreements and Refuses to Recognize Unions

Over the weekend of September 6 and 7, Manderfield, Manganello, and D'Andrea hired employees to resume the warehouse/fulfillment operation. The employees were contacted by Manganello directly, and selected without regard for the seniority provisions of Liberty's contracts with the Federation and the IUE.[FN[FN9]] Trafford established new wage rates, benefits levels, and other conditions of employment for these employees without notifying, bargaining with, or obtaining the consent of, the Federation and the IUE. Trafford paid the employees $12 per hour-less than they had been making with Liberty under the contracts-and informed them that the company had not made a decision about whether to provide medical insurance.[FN10] Shenefelt, who had been human resources manager with Liberty, was hired to perform human resources functions for the resumed warehouse/fulfillment operation. On Monday, September

8, employees who had been hired over the weekend appeared for work and, along with the managers, they resumed the warehouse/fulfillment operation at the same location where Liberty had been operating. All but two of the 10 to 12 people Trafford hired to begin work during the week of September 8 had been employed by Liberty as of September 3. Four of Trafford's new warehousemen had been operating printing presses until September 3, and one had been a subcontractor who made deliveries for Liberty. One individual who had been the customer service representative associated with the warehouse/fulfillment operation prior to September 3, was hired by Trafford to continue performing customer service work. One of the hirees had been a warehouse worker before the suspension of operations. The managers and employees of Trafford were called-upon to perform a more varied, flexible, set of duties than individuals working for Liberty had generally done prior to September 3. For example, Manderfield had to perform accounting work himself, rather than just supervising others who did that work. Prior to September 3, the duties of warehouse employees included receiving stock, putting stock away, performing inventory related tasks, picking and pulling materials to fill orders, packing and preparing to ship orders, and operating shipping computers. Beginning on September 8, warehouse employees continued to perform those duties, and, in addition, performed janitorial and maintenance work.

After receiving reports that people were again working at the Liberty facility, Zahorchak spoke with Manganello on September 10. Manganello confirmed that the company had decided to continue the warehouse/fulfillment element of Liberty's business, and that there were people at the plant working to complete those orders. Zahorchak asked Manganello about the applicability of the IUE contract, and Manganello told him that the question should be directed to Carmody. Testa spoke with Carmody on September 10 and Carmody told him that there would be no recall of Federation employees and that the company was "not going to recognize the Union."

E. Former Employees of Liberty Do Not Receive Severance, Back Wages, and Accrued Vacation Benefits Provided for Under Contracts With Liberty

Under the contracts that Liberty had with the Federation and IUE, the terminated employees were entitled to various severance benefits. Those benefits included severance pay and payments for accrued vacation days neither of which were ever paid to the employees. Nor were the former employees paid for the work they performed on September 1, 2, and 3-the days that employees worked leading up to J. Wortley's surrender of the Liberty assets. The Bank did make contributions to the employees' retirement fund equal to the amount of employee contributions that had already been deducted from paychecks, but which had not yet been remitted to the fund.

On September 16, Carmody met with Testa, Zahorchak, Kundrick, and other union officials at the IUE office. Carmody told the union officials that J. Wortley was having trouble with the bank and that the company had been involved in a number of "financial disagreements," including one with a vendor that had led to a judgment against the company. Carmody stated that J. Wortley had decided to turn the assets of the printing business over to the Bank. He stated that partners of J. Wortley's would continue with the warehouse/fulfillment operation, at the same location, using a new company called Trafford Distribution Center. According to Carmody, J. Wortley himself would have no part in the new company, which was to be managed by Manderfield, Manganello, and D'Andrea. When a union official asked why the recall provisions of the IUE contract had not been followed with respect to staffing the resumed warehouse/ fulfillment operation, Carmody responded that "Trafford ... had every right to form a new business and hire new employees without union representation." Regarding benefits due under the contract to employees who had formerly worked for Liberty, Carmody stated that he could not "make any promises" that those employees would receive severance pay, accrued vacation pay, or

back wages, but that he believed outstanding medical claims would be paid, and that every effort was being made to fully fund the employees' retirement plan. One of the union officials asked about filing a grievance and Carmody stated, "I am not accepting a grievance," and opined that, "There is no company to file a grievance against."

On October 15, 2003, Robert Wentroble, assistant to the IUE president, sent a letter to Carmody initiating the grievance procedure and demanding that the employees represented by the IUE receive all outstanding benefits-including wages, accrued vacation pay, and sick day pay. Carmody responded with a letter, dated October 24, 2003, in which he expressed a willingness to meet with Wentroble, but stated that he no longer had any affiliation with Liberty or controlled any of its assets. He stated that Liberty was now "owned" by the Bank. In a letter to Carmody, dated November 4, 2003, Testa stated that Liberty "and its alter ego, Trafford" had abrogated their agreement with the Federation by, inter alia, ceasing the printing operations, terminating employees without regard for seniority, and failing to pay terminated employees the severance benefits provided for under the contract. Carmody responded with a letter dated November 6, 2003. As in his October 24 letter to Wentroble, Carmody expressed a willingness to meet, but stated that Liberty was now owned by the Bank and that he was no longer affiliated with it and did not control any of its assets.

F. The Complaint Allegations

The complaint alleges that Liberty and Trafford are alter egos and/or a single employer and that they violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to bargain with the Federation or the IUE over the effects of its actions before: ceasing operations; transferring assets to Liberty's creditor; terminating the employment of individuals represented by the Federation and the IUE; and forming Trafford to continue a portion of Liberty's operations. The complaint further alleges that

Liberty and Trafford violated Section 8(a)(5) and (1) by: failing to bargain with, or obtain the consent of, the Federation and the IUE before refusing to pay the terminated employees severance pay, accrued vacation pay, health care benefits, employee security and protection plan benefits, and commissions due pursuant to the applicable collective-bargaining agreements; failing to remit moneys deducted from employees' pay to the appropriate 401(k) trust funds pursuant to the applicable collective-bargaining agreements; recalling Federation and IUE workers in a manner contrary to the seniority provisions of the applicable collective-bargaining agreements; refusing to recognize and bargain with the Federation and the IUE when it resumed the warehouse and distribution operations; and, refusing to continue or adhere to the wage rates, benefit levels and other terms and conditions of employment set forth in the applicable collective-bargaining agreements when it recalled employees for the resumed warehouse and distribution operation.

III. ANALYSIS AND DISCUSSION

A. Alter Ego Status

The General Counsel alleges that Trafford is an alter ego of Liberty, and therefore, is required to comply with Liberty's collective-bargaining agreements and to recognize and bargain with the Unions representing Liberty employees. It is "well settled that an employer cannot evade its obligations under the Act by forming what appears to be a new company but is in fact a 'disguised continuance' or alter ego of the old company." *Mar-Kay Cartage*, 277 NLRB 1335, 1340 (1985), enfd. 822 F.2d 1089 (6th Cir. 1987). In order to decide if two facially independent employers are alter egos, the Board considers whether the two entities have substantially identical ownership, management, supervision, business purposes, operation, equipment and premises, and customers. See *Goldin-Feldman, Inc.*, 295 NLRB 359, 370-371 (1989); *Ford Bros.*, 294 NLRB 107, 139 (1989); *Advance Electric*, 268 NLRB 1001, 1002 (1984), enfd. 748 F.2d 1001 (5th Cir. 1984), cert. denied 470 U.S. 1085

(1985); *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). The Board also looks to "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Fugazy*, 265 NLRB at 1302. No single one among these factors is determinative of alter ego status and not all the indicia need be present for the Board to conclude that a finding of alter ego status is appropriate. See, e.g., *Standard Commercial Cartage, Inc.*, 330 NLRB 11, 13 (1999); *MIS, Inc.*, 289 NLRB 491, 492 (1988); *Fugazy*, 265 NLRB at 1301. Based on my consideration of the evidence in this case, as viewed through the prism of the factors articulated by the Board, I conclude that Trafford is an alter ego of Liberty.

As discussed above, Trafford is wholly owned by B. Wortley, the wife of J. Wortley, the sole owner of Liberty. The Board has repeatedly held that substantially identical ownership is established where the two enterprises are owned by members of the same family. Thus, in *Industrial TurnAround Corp.*, 321 NLRB 181, 185 (1996), enfd. in relevant part 115 F.3d 248, (4th Cir. 1997), common ownership was found where, as here, the alleged alter ego was owned in its entirety by the wife of the sole owner of the original company. Indeed, the Board has found substantial identity of ownership when members of the same family have stock ownership in the two enterprises, even if such ownership does not account for all the stock of both entities, or is divided among a number of family members. *Goldin-Feldman, Inc.*, 295 NLRB at 372; *Mar-Kay Cartage*, 277 NLRB at 1341; *Advance Electric*, 268 NLRB at 1004; *I.M. Tanaka Construction*, 249 NLRB 238, 241 fn. 29 (1980), enfd. 675 F.2d 1029 (9th Cir. 1982).

Furthermore, in this case, the surrounding circumstances strongly suggest that the decision to designate J. Wortley's wife, rather than J. Wortley himself, as the owner of Trafford did not result in a true transfer of control. As the General Counsel points out in

its brief, "there is no evidence in the record that Barbara Wortley ever played any active role whatsoever in the operations of [Trafford], while there is ample evidence that Joseph Wortley, Jr., both oversaw the establishment of that company and continued involvement in its operations thereafter." Indeed, it was J. Wortley who initiated the discussions with Liberty's managers about the possibility of continuing the warehouse/ fulfillment operation using a new company and proposed that "he or his family would finance that and set up a new company." Then J. Wortley arranged for a bank to provide special financing based on the company's unpaid accounts receivable. Similarly, it was J. Wortley, not his wife, who discussed the shape the new business would take, and the Wortley family's involvement, with Manderfield, Manganello, and D'Andrea. In addition, J. Wortley's real estate company, which owned the premises where Trafford did business, did not actually require the new company putatively owned by his wife to make payments due for rent during the first months of operation. Those payments were deferred and the record does not show that they were ever made. In determining whether common ownership exists, "the Board does not view legal ownership in a vacuum, but instead looks to the totality of the circumstances to determine where the real control exists," *East Tennessee Packing Co.*, 270 NLRB 520, 524 (1984). Here the totality of circumstances confirms that the real control of Trafford was with J. Wortley, not his wife. A strong showing of common ownership of Liberty and Trafford has been made.

The record also establishes that Trafford and Liberty had substantially identical management and supervision. Three of Liberty's four managers- Manderfield, Manganello, and D'Andrea-became the management team at Trafford. Nellie Mae Shenefelt who had responsibility for human resources matters at Liberty, also performed those duties for Trafford. Carmody, who had been Liberty's president, did not become a manager of Trafford; however the record shows that, even while Liberty existed, Carmody had overseen multiple other companies for J. Wortley, calling into question the extent of his

involvement in the day-to-day, hands on, management of Liberty. At any rate, most of the management team that ran Liberty became managers of Trafford, and every one of Trafford's managers had been a Liberty manager on September 3. This constitutes a strong showing of substantial identity in management.[FN11]

The question of whether Liberty and Trafford had substantially identical business purposes and operations is a closer one. On the one hand, the warehouse/fulfillment operation had been a small portion of Liberty's overall business and operation. On the other hand, Trafford's initial business consisted entirely of continuing Liberty's warehouse/fulfillment component. Moreover, Liberty's warehouse/fulfillment operation remained complete and it functioned during the transition from Liberty to Trafford without a significant hiatus. *Goldin-Feldman, Inc.* 295 NLRB at 374 (alter ego status found where, inter alia, there was no hiatus between cessation of operations by original company and commencement of operations by new company); *MIS, Inc.*, 289 NLRB at 491 (in determining whether enterprise is alter ego, Board considers whether there has been a hiatus in operations). The record shows that on September 8, Trafford simply took over the same work, on the same orders, for all the same customers that Liberty's warehouse fulfillment operation had serviced until September 3.

The Board has found alter ego status under circumstances, such as those at issue here, where only a portion of the original company's business is transferred to the new enterprise. See *Standard Commercial Cartage, Inc.*, 330 NLRB at 14; *Eckert Fire Protection*, 332 NLRB 198, 201 (2000); *Industrial Turn-Around Corp.*, 321 NLRB at 187. Still I am given pause because the discrete operation within Liberty that survives in the form of Trafford represented a small element of Liberty's overall business. Neither party has identified any decisions where the Board has considered whether under such circumstances substantial identity of business purpose and operation exists for purposes of the alter ego analysis.

Roughly analogous precedent does exist, however, in the context of successorship cases. In those cases, the Board has found sufficient commonality of ownership where even a small portion of the original company's business is transferred to the new enterprise, but a majority of the new enterprise's employees are from the predecessor's bargaining unit. In *Bronx Health Plan*, 326 NLRB 810, 812 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999) (Table), for example, successor status was found even though the new entity was engaged in a somewhat different type of business than its predecessor and its employees consisted of less than six percent of the predecessor's employee unit. Similarly, in *Lincoln Park Zoological Society*, 322 NLRB 263, 265 (1996), enfd. 116 F.3d 216 (7th Cir. 1997), successorship status was found when the new entity took over only one of the predecessor's 100 locations and only about 3 percent of its complement of unit employees. The portions that Trafford assumed of Liberty's business and workforce were at least as substantial as those taken over by the successors in *Bronx Health* and *Lincoln Park.* Moreover, a clear majority of Trafford's employees came from the Liberty bargaining units. Given the facts and law regarding the issue, I conclude that a showing has been made that Trafford and Liberty had substantially identical business purposes and operations.

The record also shows substantial identity of equipment and premises. Indeed, Trafford was renting the very same premises that Liberty had occupied until September 3. The equipment that Trafford was using was the exact same equipment that Liberty's warehouse/fulfillment operation had used. Regarding customers, the evidence shows that all of Trafford's initial customers were Liberty customers. During the first 8 month's of Trafford's existence, the vast majority of its revenues, over 98 percent, were generated from warehouse/ fulfillment customers that had been Liberty's warehouse/fulfillment customers until September 3. Most of the customers for Liberty's warehouse/fulfillment operation continued on as customers of Trafford after September 3. I conclude that the warehouse/fulfillment operation had substantially the same customers before

and after the transfer of that operation from Liberty to Trafford.

The final consideration is "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Fugazy*, 265 NLRB at 1302. As with the other indicia, a showing of improper motive is not necessary to a finding of alter ego status. *A&P Brush Mfg. Corp.*, 323 NLRB 303, 309 (1997); *Johnstown Corp.*, 313 NLRB 170, 171 (1993), remanded 41 F.3d 141 (3d Cir. 1994), on remand 322 NLRB 818 (1997). Regarding the question of motivation, I begin by observing that I consider it implausible that J. Wortley would sacrifice the printing and e-source operations that constituted over 90 percent of Liberty's business for the purpose of freeing the warehouse/fulfillment operation from its labor law responsibilities. As Respondent's counsel suggested during trial, that would not be the tail wagging the dog, but the "tip of the tail" wagging the dog. However, J. Wortley's decision to create a new business entity, i.e. Trafford, as the vehicle for continuing the warehouse/fulfillment business, rather than continuing to use Liberty for that purpose could have been motivated by a desire to avoid labor law responsibilities, even if the decision to cease Liberty's other operations was not. Compare *Martin Bush Iron & Metal*, 329 NLRB 124 (1999) (even though cessation of original company's operations was motivated by purpose legitimate under the Act, alter ego status found where manner in which new company resumed operations was motivated by a desire to avoid labor law responsibilities). Liberty's labor law responsibilities were substantial, and included the obligation to provide laid-off employees with the previously bargained-for severance benefits, accrued vacation pay and backpay, as well the responsibility to provide the retained unit employees with the bargained-for wages, and terms and conditions of employment.

There is little in the record to show that the decision to cease operating as Liberty and continue the warehouse/fulfillment operation in the form of a new

entity, was done for legitimate reasons. J. Wortley did not testify to state the reasons for these actions; nor did Carmody or B. Wortley. Rather the Respondent relied on double hearsay-testimony by witnesses about what Carmody told them that he had been told by J. Wortley. I consider that hearsay testimony an unreliable indicator of J. Wortley's motives and, in any case, general and unhelpful regarding the reasons for J. Wortley's decision to cease operating as Liberty. On the other hand, I believe the record does provide some basis for believing that Trafford was created for illegitimate reasons. I note, first, the transparent ploy of designating B. Wortley, rather than J. Wortley, as the owner of Trafford. As discussed above, control continued to rest with J. Wortley, not his wife, after Liberty ceased to operate and Trafford was formed. The Respondent has provided no legitimate reason for this ruse and it is hard to explain absent a desire to avoid the consequences that might follow from acknowledging that J. Wortley controlled both entities. I also believe that some evidence of a motive to avoid labor law obligations is provided by Carmody's refusal to accept or process grievances or otherwise acknowledge his responsibilities as the president of Liberty, or the responsibilities of Liberty to its former employees. Further evidence of anti-union motivation is provided by the failure of Liberty's management to notify the Unions of the decision to suspend Liberty's operations and surrender its assets to the Bank, and its failure to bargain with the Unions over the effects of those actions on unit employees. These decisions were made while Liberty was still operating and, as I will discuss below, constitute violations of the Act.

I also believe that it is appropriate to draw an adverse inference from the failure of J. Wortley and B. Wortley, to testify about the purposes motivating the decision to create a new company to carry on the warehouse/fulfillment operation, instead of continuing that operation as Liberty. The Respondent did not claim that the Wortleys were unavailable or otherwise explain their failure to testify. It is clear that the actions undertaken by the Wortleys to continue the

warehouse/fulfillment operation using the new entity, Trafford, rather than through Liberty, would be expected to result in a benefit to the employer by relieving it of very substantial obligations under the Act and existing labor contracts. Yet the Wortleys did not testify to deny that these concerns motivated them. Since it can reasonably be assumed that the Wortleys were favorably disposed towards the companies they owned, I believe it is appropriate, given the failure of either one to testify about their motives, to draw an adverse inference about those motives. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (Table). To sum up, the evidence shows that J. Wortley closed the warehouse/ fulfillment business he owned late on a Wednesday, and resumed that warehouse/ fulfillment business on the following Monday as a new enterprise at the same location with the same clients, and essentially the same managers, but without recognizing the Unions or applying the existing collective bargaining agreements. Moreover, J. Wortley did not testify to a legitimate purpose for his actions. I conclude that a desire to avoid labor law obligations was a motivation for those actions.[FN12]

The Respondent argues at length that a finding of alter ego status is precluded by the Board's decision in *East Tennessee Packing Co.*, supra. See Respondent's Brief at 23 ff. In that case, a company that packaged and placed its brand name on meat products manufactured by others was found not to be the alter ego of a defunct company that used the same brand name but had been engaged in slaughtering hogs, preparing fresh pork items and manufacturing a full line of bologna and other meat products. The circumstances relating to alter ego status in the instant case are dissimilar to those in *East Tennessee Packing* in most of the respects the Board found most telling there. For example, in *East Tennessee Packing* the majority of the original company was owned by a trust that had no ownership in the alleged alter ego and the decision explicitly distinguished cases, such as the instant one, where "both enterprises [are] either wholly owned by members of the same family or nearly totally owned by

the same individual." 270 NLRB at 524. The decision in *East Tennessee Packing* also noted that the owner of the alleged alter ego was not the one who decided to discontinue the operations of the original company. This contrasts with the instant case, where J. Wortley made the decision to discontinue Liberty's operations and then organized, and through his wife funded, Trafford to continue Liberty's warehouse/fulfillment operation. In addition, the alleged alter ego in *East Tennessee Packing*: retained none of the original company's major customers; took little of its management team from the original company; began operating after a significant hiatus following the original company's closing; and rented only a small portion of the original company's facility. These important facts all diverge from those demonstrated in the instant case, and make clear that a different result is appropriate with respect to Liberty and Trafford than was called for in *East Tennessee Packing*.[FN13]

Trafford and Liberty have substantially identical ownership, management/supervision, business purposes, operation, equipment, premises and customers. The record also shows that the decision to create Trafford was motivated by a desire to evade Liberty's responsibilities under the Act. I find that Trafford and Liberty are alter egos.[FN14]

B. Alleged Violations of Section 8(a)(5) and (1) of the Act

Trafford, as an alter ego, is viewed to be essentially the same entity as Liberty, and is bound not only to bargain with the incumbent unions, but also to follow the terms of the existing labor agreements between Liberty and the Unions. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 fn.5 (1974); *Concourse Nursing Home*, 328 NLRB 692 (1999). An alter ego enterprise violates Section 8(a)(5) and (1) by refusing to meet this bargaining obligation, or by failing to apply the terms of existing labor agreements to unit employees. *Standard Commercial Cartage, Inc.*, 330 NLRB 11, 14 (1999).

I turn first to the allegation that Liberty violated Section 8(a)(5) and (1) by failing to meet its bargaining obligations before ceasing operations, transferring assets to a creditor, and terminating the employment of individuals represented by the Unions on September 3. Given that J. Wortley subsequently used an alter ego to continue part of his Liberty operation, the cessation and surrender of assets amount to a partial closing of its business. The Board has held that an employer violates Section 8(a)(5) and (1) when it lays off employees and partially closes its facility "without prior notice to the Union and without having afforded it an opportunity to bargain with the [employer] with respect to the layoff or the effects of the layoff and partial closing." *American Medical Waste Systems*, 321 NLRB 680, 681 (1996).[FN[FN15]] In the instant case, the Respondents terminated bargaining unit employees and partially closed the business without prior notice to the Unions and without bargaining over the terminations or the effects of the terminations and the partial closure. The Respondents did not meet, or even attempt to meet, their bargaining obligations before taking these actions and have not argued that the changes were not mandatory subjects of bargaining.

For the reasons discussed above, I find that the Respondents violated Section 8(a)(5) and (1) of the Act by terminating bargaining unit employees and partially closing its business without prior notice to the Federation and the IUE and without bargaining over the effects of the termination and the partial closure.[FN16]

After the bargaining unit employees were terminated, the Respondents failed to honor many of their obligations to them under the existing collective-bargaining agreements. Specifically, the Respondents declined to provide the workers with severance pay or accrued vacation pay. The Respondent did not even pay the terminated employees for work they had already performed on September 1, 2, and 3.[FN17] Then, the Respondents re-employed a number of bargaining unit employees, but did so without regard to the contract

provisions calling for seniority to be a factor in selecting employees for reemployment. The Respondents failed to provide the re-employed individuals with the wages, benefits, and terms and conditions of employment, to which bargaining unit employees were entitled under the contracts. Before effectively repudiating the collective-bargaining agreements in this manner, the Respondents did not give the Unions notice or an opportunity to bargain. On September 10, Carmody told Testa that the new company would not recognize the Unions and on September 16, during a meeting with Testa, Zahorchak, and other union officials, Carmody expressed the view that the company had a right to hire employees without union representation and without regard to the recall provisions of the union contracts. During that meeting, and afterward by letter, Carmody informed the union officials that he would not accept grievances on behalf of the Respondents. Indeed, at the meeting he claimed that there was no company to file grievances with. The Respondents violated the Act by refusing to recognize and bargain with the incumbent unions, and by failing to apply the terms of the existing collective-bargaining agreements to unit employees. See *Howard Johnson v. Detroit Local Joint Exec. Bd.*, supra, *Concourse Nursing Home*, supra, *Standard Commercial Cartage*, supra.

The Respondents argue that even if Trafford and Liberty are alter egos, they should not be required to honor the terms of the collective bargaining agreements because the Unions did not file grievances and pursue arbitration under those agreements. Given Carmody's refusal to accept grievances from the Unions, this contention is, to put it mildly, disingenuous, and I reject it. Compare *Budrovich Contracting Co.*, 331 NLRB 1333, 1344 (2000) (Board defers unfair labor practice proceeding pending arbitration only when, inter alia, the employer is willing to arbitrate.), enfd. 20 Fed.Appx. 596 (8th Cir. Oct 15, 2001). The Respondents also argue that the case should be dismissed because the collective-bargaining agreements with the Unions expired as of January 31, 2004. This argument fails because the Respondents committed, or began committing, all of the unfair labor

practices at issue prior to January 31, 2004. The Respondents cite no authority at all for the notion that they are somehow absolved from previously committed unfair labor practices by the subsequent expiration of the contracts. Such a result would be particularly at odds with the purposes of the Act under the circumstances of this case, since the Respondents' refusal to bargain precluded any possibility of negotiating new contracts or a further extension of the existing contracts.

I find that, beginning on or about September 3, the Respondents violated Section 8(a)(5) and (1) of the Act by: refusing to recognize and bargain with the incumbent unions; failing to provide terminated workers with severance pay, accrued vacation pay, and compensation to which those employees were entitled under the applicable collective-bargaining agreements; failing to select the employees for reemployment in compliance with the collective-bargaining agreements; setting wages, benefits, and terms and conditions of employment for the returning unit employees that were inconsistent with the collective-bargaining agreements; and, changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the Unions and without affording the Unions an opportunity to bargain.

CONCLUSIONS OF LAW

1. Respondent Liberty and Respondent Trafford are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Federation and the IUE are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents Liberty and Trafford are alter egos.

4. The Respondents violated Section 8(a)(5) and (1) of the Act by: terminating bargaining unit employees and partially closing its business without prior notice to the Federation and the IUE and without bargaining over the effects of the termination and the partial closure; refusing

to recognize and bargain with the Federation and the IUE; failing to provide terminated unit employees with severance pay, accrued vacation pay, and compensation to which those employees were entitled under the existing collective-bargaining agreements; failing to select the employees for reemployment in compliance with the collective-bargaining agreements; setting wages, benefits, and terms and conditions of employment for the returning unit employees that were inconsistent with the collective-bargaining agreements; changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the Unions and without affording the Unions an opportunity to bargain.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist from those practices and to take certain affirmative action designed to effectuate the policies of the Act. With respect to those employees who the Respondents did not re-employ for the resumed warehouse/fulfillment operation, but who would have been re-employed had the selection provisions of the collective-bargaining agreements been followed, I find that a full backpay remedy is appropriate from the dates on which those individuals would have been re-employed. Except for that group, the limited backpay remedy described in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968), is appropriate for the employees who the Respondents terminated as a result of the partial closure of its business. This limited remedy, rather than full backpay, is appropriate because those terminations were the direct result of the partial closure and the Respondents did not have an obligation to bargain over the partial closure, but only over its effects.[FN18] *Pan American Grain Co.*, 343 NLRB No. 47, slip op. at 1 (2004); *Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1082 (2002), enfd. 2003 WL 22221353 (2d Cir. 2003). Thus, I will recommend that the Respondents be required to pay the terminated employees backpay at the rate of their normal wages when last in the Respondents' employ from

5 days after the date of this Decision and Order until the occurrence of the earlier of the following conditions: (1) the date the Respondents bargain to agreement with the Unions on those subjects pertaining to the effects of the terminations and the partial closing of its business on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union representing the employee to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondents' notice of their desire to bargain with the Union; or (4) the subsequent failure of the Union representing the employee to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he or she would have earned as wages from September 4, 2003, the date their terminations became effective, to the time he or she secured equivalent employment elsewhere, or the date on which the Respondents shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than what these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondents' employ. See *Transmarine*, supra. All backpay provided by my recommended order should be reduced by the amount of net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and increased by interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondents must reimburse employees for any loss of wages and benefits because of Respondent's failure to apply the terms and conditions of the collective-bargaining agreement in the manner prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*, supra.

I will also recommend that an appropriate notice to employees not only be posted at the facility, but also be mailed to each of the terminated employees who has not been re-employed. This is necessary since the terminated employees are unlikely to have an opportunity to view a notice posted in the Respondents' facility. See *WestPac*

Electric, 321 NLRB 1322 (1996) ("[i]t is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct); see also *Maramont Corp.*, 317 NLRB 1035, 1037 (1995) (the Board has broad discretion to fashion a "just remedy").

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[FN19]

ORDER

The Respondents, Liberty Source W, LLC and its alter ego, Trafford Distribution Center, Trafford, Pennsylvania, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Federation of Independent Salaried Unions (the Federation) and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the ICE), as the exclusive representatives of its employees in the appropriate units with respect to wages, hours, working conditions, or other terms and condition of employment, and refusing to honor the collective-bargaining agreements applicable to employees in those units.

(b) Terminating unit employees and partially closing its facility without first notifying the appropriate union or unions and offering an opportunity to bargain over the effects of the terminations and the partial closure.

(c) Refusing to provide terminated unit employees with severance pay, accrued vacation pay, and compensation to which those employees are entitled under the existing collective-bargaining agreements.

(d) Failing to select the employees for reemployment

in the manner set forth by the collective-bargaining agreements.

(e) Setting wages, benefits, and terms and conditions of employment for the returning unit employees that are inconsistent with the terms of the collective-bargaining agreements.

(f) Changing unit employees' wages, benefits, and terms and conditions of employment without prior notice to the appropriate union or unions and without affording an opportunity to bargain.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Federation as the exclusive representative of the employees in the Federation bargaining unit concerning terms and conditions of employment.

(b) On request, bargain with the IUE as the exclusive representative of the employees in the IUE bargaining unit concerning terms and conditions of employment.

(c) Reinstate all unit employees whom the Respondents did not select for reemployment when the Respondents resumed the warehouse/fulfillment operation in September 2003, but who would have been offered reemployment had the Respondents selected employees in accordance with the applicable collective-bargaining agreement provisions. Make all such employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' failure to select them for reemployment in the manner set forth in the remedy section of the decision.

(d) Bargain with the Federation and the IUE over the

effects on unit employees of the September 2003 employee terminations and the partial closure of its operations.

(e) Pay limited backpay to the unit employees terminated in September 2003 as a result of the partial closure of the operation in the manner set forth in the remedy section of this decision.

(f) Provide the unit employees terminated in September 2003 with the benefits to which they are entitled under the applicable collective bargaining agreements, including severance pay, accrued vacation pay, and compensation for work performed from September 1 to 3, 2003, in the manner set forth in the remedy section of this decision.

(g) Provide unit employees working for the Respondents after September 3 with wages, benefits, and terms and conditions of employment that are consistent with the terms of the collective-bargaining agreements, and make such employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' failure to adhere to the collective-bargaining agreements since September 3, 2003, in the manner set forth in the remedy section of this decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their facility in Trafford, Pennsylvania, copies of the attached notice marked "Appendix."[FN20] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondents' authorized representative(s), shall be posted by the

Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. The Respondents shall also mail a copy of the notice to all employees in the units represented by the Federation and the IUE who were employed by the Respondents at the Trafford, Pennsylvania facility as of September 2, 2003. The notice shall be mailed to the last known address of each of these employees after being signed by the Respondents' authorized representative(s).

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., November 24, 2004.

FN1. Sec. 102.113(a) of the Board's Rules and Regulations provides that "Complaints ... shall be served upon all parties either personally or by registered or certified mail or by telegraph, or by leaving a copy thereof at the principal office or place of business of the person required to be served."

FN2. I consider this characterization suspect given the evidence, discussed below, that 5 days after Liberty's assets were surrendered to the Bank, Liberty/Trafford managers resumed the company's warehouse/fulfillment operation without any participation by Bank officials. The Bank never operated Liberty or continued any of its businesses, except to make an effort to collect on some of the company's outstanding accounts.

FN3. Liberty's warehouse/fulfillment business consisted essentially of: receiving material from customers and storing that material at the Trafford facility; delivering or arranging for the delivery of the material to entities that ordered it; and invoicing those entities.

FN4. These percentages, which are based on the testimony, Tr. 32-35, are only approximations, and this presumably accounts for the fact that they do not add up to 100 percent. There was no evidence that Liberty was engaged in any other types of business.

FN5. Carmody also oversaw the operations of other companies that J. Wortley owned.

FN6. That notice read as follows:

NOTICE OF SURRENDER OF COLLATERAL

TO: INDEPENDENCE COMMUNITY BANK

THE BORROWER, LIBERTY SOURCE W, LLC, hereby notifies the secured creditor, Independence Community Bank, that it is surrendering its collateral covered by the liens of Independence Community Bank located in Pittsburgh, Pennsylvania to the bank for disposition pursuant to the provisions of the Uniform Commercial Code of Pennsylvania and to the provisions of the loan documents between Independence Community Bank, as Lender and Secured Creditor, and Liberty Source W, LLC.

You are further notified that it is your obligation under the loan documents and under the Uniform Commercial Code to take possession of this collateral, protect it and maximize its value to be applied against the debt that is the subject of the security interest.

Dated this 3 day of September, 2003.
LIBERTY SOURCE W, LLC

BY [signed]

Richard Carmody, President

FN7. The loan agreement between Liberty and the Bank provides that, in the event of a default, the Bank has numerous rights, including: to seize and sell Liberty's assets; to "use, operate, manage and control" those assets "in any lawful matter"; and to "maintain, repair, renovate, alter or remove" the company's assets. Trafford has identified no provision of the agreement that gives the Bank the right to do any of those things if Liberty does not default, or which gives Liberty the right to decide for the Bank which of those options, if any, the Bank will exercise in the event of default. Certainly, the agreement does not give Liberty the right to impose on the Bank a duty to operate the company or assume Liberty's contractual obligations as an employer. To the contrary, the loan agreement specifically states that none of its provisions make the Bank liable for performance of Liberty's contracts. (GC Exh. 9 at p. 13 Sec. 3.2(a).) Trafford does not claim, and the record does not show, that the Bank had requested that Liberty surrender its assets, or notified Liberty that the company was in default at the time Liberty surrendered its assets. Indeed, the evidence was that the responsible Bank official indicated that he was caught completely off guard by J. Wortley's decision to surrender Liberty's assets.

The loan document includes among the circumstances that constitute "default events," the entry of a judgment (or aggregate judgments) against Liberty of more than $50,000 that is "not fully covered by insurance, or a warrant of attachment," where such judgment is not discharged or stayed pending appeal within a period of 60 days or 10 days for judgments totaling over $100,000. As discussed above, the record shows that on August 27, 2003, a judgment was entered against Liberty in the amount of $291,585.25. However, the record does not show that the Bank could, or did, consider that judgment to be a default event. At the time that Liberty notified the Bank of the surrender of assets, the 10-day period

following entry of the judgment had not lapsed. Moreover, the entry of such a judgment does not constitute default unless it is not covered by insurance, has not been discharged, and has not been stayed pending appeal-requirements that are not established by the record before me.

FN8. Apparently before the sale took place, Trafford was already using much, or all, of that equipment. The record does not explain on what basis Trafford was using equipment that Liberty had surrendered to the Bank, but which Trafford had not yet purchased from the Bank.

FN9. The Federation contract states that "[i]n all cases of layoffs, seniority shall first be given consideration and employees will be permitted to displace other less senior employees but only if the employee can perform the duties of the job." (GC Exh. 2 at Art. VII, Sec. 6.) The Federation contract also provides that when vacancies are filled during a layoff, employees within a department, "shall be recalled by seniority in the reverse order of layoff." Id. at Sec. 5. The IUE contract provides that "in all cases of layoffs due to decreasing forces, accumulated length of service will govern, and employees will be permitted to displace other employees only if the employee can perform the duties of the job." (GC Exh. 4 at Sec. XIII(D)(1).) The IUE contract also indicates that laid-off employees will fill subsequent openings based on seniority. Id. at XIII(B) and (F).

FN10. Trafford ended up providing the employees with health insurance coverage under the same health plan that provided their insurance prior to September 3. This coverage was continued for a period of approximately 3 months, and then Trafford obtained a different health insurance plan for the employees.

FN11. No party has claimed that either Liberty or Trafford had supervisors in addition to their management teams. Thus it appears that the substantially identical management also constitutes substantially identical supervision.

FN12. A desire to avoid labor law obligations may not have been the sole reason for J. Wortley's ceasing to operate as Liberty and creating Trafford. Indeed, it is not unlikely that another reason was a desire to go forward with the warehouse/fulfillment operation unencumbered by demands from Liberty's creditors. However, if a desire to evade labor law obligations is even one of the employer's reasons for forming a disguised continuance of its old company, that reason is still sufficient for purposes of the "motive" factor in the alter ego analysis. *Martin Bush Iron & Metal*, 329 NLRB at 124; *Michael's Painting, Inc.*, 337 NLRB 860 (2002), enfd. 85 Fed.Appx. 614 (9th Cir. 2004).

FN13. Trafford also relies on the decisions in *Perma Coatings, Inc.*, 293 NLRB 803 (1989), and *P.J. Hamill Transfer Co.*, 277 NLRB 462 (1985). I have considered those decisions, but neither affects my conclusion that Liberty and Trafford are alter egos. In *Perma Coatings*, the Board based its finding that two companies were not alter egos on, inter alia, the facts that the owner of the first company did not control the second company, and that the first company was operationally defunct when the second company was created. This contrasts with the instant case, where J. Wortley controlled both companies, and the record shows that Trafford began hiring employees while Manderfield was still trying to preserve the Liberty operation. Most of Liberty's equipment- the printing presses and so forth-were not sold until months after Trafford began operating, and there is no evidence that Liberty was ever dissolved as a corporate entity. Similarly, in *P.J. Hamill*, the Board found that alter ego status was not appropriate because there "were critical differences-e.g., in ownership, nature of operations, and customers." 277 NLRB at 462. It is not surprising that the Board declined to find alter ego status there, but the "critical differences" that were determinative in that case are absent here. Trafford had essentially the same ownership as Liberty, and substantially the same customers and operations as Liberty's warehouse/fulfillment operation. For these reasons, I reject the Trafford's contention that the decisions in

Perma Coatings and *P.J. Hamill* warrant a finding that Liberty and Trafford are not alter egos.

FN14. Given my finding that Trafford and Liberty are alter egos, it is not necessary to reach the question of whether the two entities also constitute a "single employer." In its brief, the General Counsel states that even if I find alter ego status the single employer question might "have implications for the remedy" in this case. The General Counsel does not, however, divulge what those implications might be, and none are apparent to me from the record.

FN15. Although an employer is required to bargain concerning the effects of a partial closure on unit employees, it is not ordinarily required to bargain over the decision to effect a partial closure. *United Technologies Corp.*, 287 NLRB 198, 203 (1987), affd. 884 F.2d 1569 (2d Cir. 1989); *Central Mack Sales*, 273 NLRB 1268, 1277 (1984).

FN16. I would still find these violations even had I concluded that Liberty and Trafford were not alter egos. These actions were taken over the period ending on September 3, when the enterprise was still operating as Liberty.

FN17. The record evidence does not demonstrate that, as alleged in the complaint, the Respondents failed to pay the terminated employees health care benefits, security and protection plan benefits, and commissions required by the applicable contracts, or that the Respondent failed to properly remit funds to the employees' pension funds.

FN18. See fn. 15, supra.

FN19. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

FN20. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the Federation of Independent Salaried Unions (the Federation) and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, Local 601, AFL-CIO (the IUE), as the exclusive representatives of their employees in the appropriate units with respect to wages, hours, working conditions, or other terms and condition of employment.

WE WILL NOT refuse to honor the collective-bargaining agreements applicable to you.

WE WILL NOT terminate you or partially close our facility without first notifying the appropriate unions and offering an opportunity to bargain over the effects of the terminations and the partial closure.

WE WILL NOT refuse to provide terminated unit employees with severance pay, accrued vacation pay, and compensation to which those employees are entitled under the existing collective-bargaining agreements.

WE WILL NOT select employees for reemployment in a manner other than that required by the collective-bargaining agreements.

WE WILL NOT set wages, benefits, and terms and conditions of employment for returning unit employees that are inconsistent with the terms of the collective-bargaining agreements.

WE WILL NOT change your wages, benefits, and terms and conditions of employment without prior notice to the appropriate union or unions and affording an opportunity to bargain.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Federation as the exclusive representative of the employees in the Federation unit concerning terms and conditions of employment.

WE WILL, on request, bargain with the IUE as the exclusive representative of the employees in the IUE unit concerning terms and conditions of employment.

WE WILL reinstate all unit employees who we did not select for reemployment when we resumed the

warehouse/fulfillment operation in September 2003, but who would have been offered reemployment had we selected employees in accordance with the applicable collective-bargaining agreement provisions. In addition, WE WILL make all such employees whole for any loss of earnings and other benefits suffered as a result of our failure to select them for reemployment.

WE WILL bargain with the Federation and the IUE over the effects on unit employees of the September 2003 employee terminations and the partial closure of our operations.

WE WILL pay limited backpay to the unit employees terminated in September 2003 as a result of the partial closure of our operation.

WE WILL provide the unit employees terminated in September 2003 with the benefits to which they are entitled under the applicable collective-bargaining agreements, including severance pay, accrued vacation pay, and compensation for work performed from September 1 to 3, 2003.

WE WILL provide unit employees working for the Respondents after September 3, 2003, with wages, benefits, and terms and conditions of employment that are consistent with the terms of the collective-bargaining agreements, and make such employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' failure to adhere to the collective-bargaining agreements.

LIBERTY SOURCE W, LLC AND/OR TRAFFORD DISTRIBUTION CENTER

344 NLRB No. 137, 177 L.R.R.M. (BNA) 1331, 2005 WL 1767248 (N.L.R.B.)

END OF DOCUMENT

APPENDIX C

1. 29 U.S.C. § 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

2. 29 U.S.C. § 157 provides:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided*

further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) **Unfair labor practices by labor organization**

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor

organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed

to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) **Expression of views without threat of reprisal or force or promise of benefit**

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) **Obligation to bargain collectively**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) **Enforceability of contract or agreement to boycott any other employer; exception**

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing

parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

3. 29 U.S.C. § 159 provides:

(a) **Exclusive representatives; employees' adjustment of grievances directly with employer**

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) **Determination of bargaining unit by Board**

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the

safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) **Hearings on questions affecting commerce; rules and regulations**

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same

regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) **Petition for enforcement or review; transcript**

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and

thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) **Secret ballot; limitation of elections**

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.